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**BANKER AND CUSTOMER**

*Second Impression*

# BANKER AND CUSTOMER

BY

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## PREFACE

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IN preparing this volume I have aimed at providing for students and practical bankmen a clear and up-to-date exposition of the principles and practice of banking as conducted in this country. Whilst I have endeavoured to make the work as comprehensive as is necessary for most practical and examination purposes, I have sought to preserve the clarity and interest of the text by eliminating abstruse intricacies and unessential details.

The law relating to bills of exchange, promissory notes and cheques has received fairly extensive treatment, commensurate with its supreme importance both from a practical and examination standpoint. A feature of this section of the work consists in the inclusion of a large number of illustrative examples gleaned from a variety of sources.

Clearly, a volume of this nature could not be compiled without constant reference to the recognised authorities and standard text-books on the subject. Many of the works which I have consulted, both as a student of banking and in the compilation of this book, are mentioned in the context, but I wish in particular to acknowledge my indebtedness to the works of Sir John Paget, Sir Mackenzie Chalmers, and Dr. Heber Hart. *Questions on Banking Practice* and *Legal Decisions Affecting Bankers*, published by the Institute of Bankers, have afforded me a wealth of information in a readily accessible form, and to these works also my acknowledgments are due and are here accorded.

S. E. T.

September, 1936.

# CONTENTS

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	PAGE
BILLS OF EXCHANGE ACTS, 1882-1917. TABLE OF SECTIONS . . . . .	ix
TABLE OF STATUTES CITED . . . . .	xiii
TABLE OF CASES CITED . . . . .	xv

## PART I: THE BANKER

CHAP

1. THE DEVELOPMENT OF BRITISH BANKING . . . . .	1
2. THE NATURE AND FUNCTIONS OF A MODERN BANK . . . . .	15
3. THE BANKER'S FUNDS, THEIR SOURCE AND EMPLOYMENT . . . . .	26
4. THE BANKER'S BANK . . . . .	44
5. THE INTERNAL ORGANISATION OF A BRITISH BANK . . . . .	58
6. THE BANKER AND THE CURRENCY . . . . .	89

## PART II: THE CUSTOMER

7. WHAT CONSTITUTES A CUSTOMER . . . . .	105
8. PARTNERS AND PARTNERSHIPS . . . . .	124
9. IMPERSONAL CUSTOMERS . . . . .	134

## PART III: BANKER AND CUSTOMER

10. THE CUSTOMER'S ACCOUNT . . . . .	160
11. BILLS OF EXCHANGE AND THE PARTIES THEREON . . . . .	194
12. CHEQUES DRAWN BY THE CUSTOMER . . . . .	244
13. THE INDORSEMENT OF CHEQUES AND BILLS . . . . .	276
14. THE PAYMENT OF A CUSTOMER'S CHEQUES AND BILLS . . . . .	308
15. THE COLLECTION OF CHEQUES AND BILLS . . . . .	349
16. THE RIGHTS, DUTIES AND POWERS OF THE HOLDER OF A BILL . . . . .	381
17. THE DISHONOUR AND DISCHARGE OF BILLS OF EXCHANGE . . . . .	419
18. PROMISSORY NOTES AND BANK NOTES . . . . .	459

CHAP.		PAGE
19.	OTHER INSTRUMENTS RELATING BANKER AND CUSTOMER . . .	474
20.	THE ACCOUNTS OF PERSONAL CUSTOMERS AND PARTNERSHIPS . . .	519
21.	THE ACCOUNTS OF IMPERSONAL CUSTOMERS . . . . .	553
22.	CUSTOMERS' SECURITIES FOR ADVANCES . . . . .	570
23.	PERSONAL SECURITY . . . . .	609
24.	LAND AND GOODS AS SECURITY . . . . .	636
25.	THE SAFE CUSTODY OF A CUSTOMER'S VALUABLES . . . . .	672
26.	THE STAMP DUTIES ON NEGOTIABLE INSTRUMENTS AND OTHER DOCUMENTS . . . . .	684
	INDEX . . . . .	712

# BILLS OF EXCHANGE ACTS, 1882 TO 1917

## Bills of Exchange Act, 1882

### TABLE OF SECTIONS

#### PART I

##### PRELIMINARY

SECTION	PAGE
1. This Act may be cited as the Bills of Exchange Act, 1882	
2. Interpretation of terms . . . . .	201, 15, 204, 209, 214, 219, 247, 279, 382, 463

#### PART II

##### BILLS OF EXCHANGE

###### *Form and Interpretation*

3. Bill of exchange defined . . . . .	97, 202, 203, 205, 210, 232, 212, 244
4. Inland and foreign bills . . . . .	210, 212
5. Effect where different parties to bill are the same person . . . . .	204, 207, 471
6. Address to drawee . . . . .	204, 218
7. Certainty required as to payee . . . . .	207, 209, 201, 210, 251, 303
8. What bills are negotiable . . . . .	208, 209, 265, 281, 331
9. Sum payable . . . . .	205, 206, 228
10. Bill payable on demand . . . . .	206, 250
11. Bill payable at a future time . . . . .	206
12. Omission of date in bill payable after date . . . . .	226, 237
13. Ante-dating and post-dating . . . . .	226, 255, 259
14. Computation of time of payment . . . . .	227, 28, 258
15. Case of need . . . . .	440, 444
16. Optional stipulations by drawer or indorser . . . . .	285, 413
17. Definition and requisites of acceptance . . . . .	394, 395
18. Time for acceptance . . . . .	205, 395, 420
19. General and qualified acceptances . . . . .	396, 203
20. Inchoate instruments . . . . .	237, 238, 239, 254, 265
21. Delivery . . . . .	217, 382, 384, 218, 277

###### *Capacity and Authority of Parties*

22. Capacity of parties . . . . .	109, 219
23. Signature essential to liability . . . . .	223, 247
24. Forged or unauthorised signature . . . . .	235, 248, 284, 390
25. Procuration signatures . . . . .	121, 225, 293, 294, 357
26. Person signing as agent or in representative capacity . . . . .	121, 225

*The Consideration for a Bill*

SECTION	PAGE
27. Value, and holder for value . . . . .	232, 233, 234, 361, 377, 578
28. Accommodation bill or party . . . . .	234
29. Holder in due course . . . . .	215, 216, 392
30. Presumption of value and good faith . . . . .	216, 232, 411, 390

*Negotiation of Bills*

31. Negotiation of bill . . . . .	226, 276, 384, 385, 386, 286
32. Requisites of a valid indorsement . . . . .	279, 280, 289
33. Conditional indorsement . . . . .	282, 203
34. Indorsement in blank and special indorsement . . . . .	280
35. Restrictive indorsement . . . . .	282, 283
36. Negotiation of over-due or dishonoured bill . . . . .	387, 388, 389, 254, 468
37. Negotiation of bill to party already liable thereon . . . . .	387, 449
38. Rights of the holder . . . . .	391, 449

*General duties of the Holder*

39. When presentment for acceptance is necessary . . . . .	398, 400, 422
40. Time for presenting bill payable after sight . . . . .	399
41. Rules as to presentment for acceptance, and excuses for non-presentment . . . . .	399, 401, 420
42. Non-acceptance . . . . .	419
43. Dishonour by non-acceptance and its consequences . . . . .	420, 379
44. Duties as to qualified acceptances . . . . .	402, 420, 433, 492
45. Rules as to presentment for payment . . . . .	231, 256, 403, 404, 405, 273, 327
46. Excuses for delay or non-presentment for payment . . . . .	407, 408, 422, 258
47. Dishonour by non-payment . . . . .	340, 421
48. Notice of dishonour and effect of non-notice . . . . .	421, 422
49. Rules as to notice of dishonour . . . . .	341, 423, 424, 425, 426, 427, 428, 380
50. Excuses for non-notice and delay . . . . .	429, 437
51. Noting or protest of bill . . . . .	423 seq. 243
52. Duties of holder as regards drawee or acceptor . . . . .	403, 404, 421, 434, 443, 440, 470

*Liabilities of Parties*

53. Funds in hands of drawee, . . . . .	413, 324
54. Liability of acceptor . . . . .	414, 235
55. Liability of drawer or indorser . . . . .	285, 412, 415, 285, 413
56. Stranger signing bill liable as indorser . . . . .	285, 219, 415
57. Measure of damages against parties to dishonoured bill . . . . .	439, 417, 433, 457
58. Transferor by delivery and transferee . . . . .	417, 282

*Discharge of Bill*

59. Payment in due course . . . . .	313, 449, 235, 338
60. Banker paying demand draft whereon indorsement is forged . . . . .	314, 272, 450, 489, 566
61. Acceptor the holder at maturity . . . . .	451

BILLS OF EXCHANGE ACTS

xī

SECTION	PAGE
62. Express waiver . . . . .	451
63. Cancellation . . . . .	452, 453, 269, 270, 286
64. Alteration of bill . . . . .	236, 239, 266, 269, 453

*Acceptance and Payment for Honour*

65. Acceptance for honour supra protest . . . . .	441, 229, 421, 442
66. Liability of acceptor for honour . . . . .	443
67. Presentment to acceptor for honour . . . . .	444, 445
68. Payment for honour supra protest . . . . .	445, 446, 447, 421

*Lost Instruments*

69. Holder's right to duplicate of lost bill . . . . .	242, 270, 472
70. Action on lost bill . . . . .	243, 242, 271, 472

*Bill in a Set*

71. Rules as to sets . . . . .	241, 242, 279, 327
--------------------------------	--------------------

*Conflict of Laws*

72. Rules where laws conflict . . . . .	230, 456
---	----------

PART III

CHEQUES ON A BANKER

73. Cheque defined . . . . .	244, 314
74. Presentment of cheque for payment . . . . .	256, 273, 327, 403
75. Revocation of banker's authority . . . . .	318

*Crossed Cheques*

76. General and special crossings defined . . . . .	259
77. Crossing by drawer or after issue . . . . .	263, 266, 363
78. Crossing a material part of cheque . . . . .	263, 266, 269
79. Duties of banker as to crossed cheques . . . . .	328, 329
80. Protection to banker and drawer where cheque is crossed . . . . .	329, 272, 482, 566
81. Effect of crossing on holder . . . . .	261
82. Protection to collecting banker . . . . .	353, 210, 294, 358-360, 362, 366, 482

PART IV

PROMISSORY NOTES

83. Promissory note defined . . . . .	460, 462, 461, 687
84. Delivery necessary . . . . .	463
85. Joint and several notes . . . . .	463, 465
86. Note payable on demand . . . . .	468
87. Presentment of note for payment . . . . .	468
88. Liability of maker . . . . .	469
89. Application of Part II to notes . . . . .	470, 459, 463

## PART V

SECTION	SUPPLEMENTARY	PAGE
90. Good faith . . . . .		314, 338
91. Signature . . . . .	222, 224, 235, 287, 292,	450.
92. Computation of time . . . . .		400, 428
93. When noting equivalent to protest . . . . .		435, 441
94. Protest when notary not accessible . . . . .		437
95. Dividend warrants may be crossed . . . . .	331, 482, 362,	483
96. The enactments mentioned in the second schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned. ( <i>The schedule is not included herein.</i> )		
Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.		
97. Savings . . . . .		481, 222, 483
98. Nothing in this Act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence.		
99. Where any Act or document refers to any enactment repealed by this Act, the Act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act.		
100. In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution as the court or judge before whom the cause is depending may require.		
This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription.		
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<b>Bills of Exchange (Crossed Cheques) Act, 1906 . . . . .</b>		<b>. 353, 359, 362, 482</b>
<b>Bills of Exchange (Time of Noting) Act, 1917 . . . . .</b>		<b>434</b>



## TABLE OF STATUTES CITED

A	PAGE	F	PAGE
Administration of Estates Act (1925) . . . . .	640	Factors Act (1889) . . . . .	122, 668
<b>B</b>		Finance Act (1894) . . . . .	696
Bank Act (1826) . . . . .	7, 45	Finance Act (1895) . . . . .	701
Bank Act (1708) . . . . .	44	Finance Act (1899) . . . . .	688, 689
Bank Charter Act (1844) 10, 45, 54, 55, 101, 103, 335, 489		Finance Act (1908) . . . . .	704
Bank Charter Act (1833) . . . . .	7, 9, 45	Finance Act (1910) . . . . .	684
Bank of England Act (1833) . . . . .	100	Finance Act (1918) . . . . .	254, 684, 688
Bank Holidays Acts (1871 and 1903)	228, 400	Finance Act (1920) . . . . .	684, 704
Bankers' Books Evidence Act (1879)	174	Finance Act (1924) . . . . .	702
Bankruptcy Act (1914) 112, 321, 513, 530, 535		Friendly Societies Acts (1896-1924))	154, 562, 695, 701
Bankruptcy Amendment Act (1926)	322, 323	<b>G</b>	
Bankruptcy Rules (1915) . . . . .	541	Gambling Act [Life Insurance Act (1774)], 1774 . . . . .	603
Betting and Loans (Infants) Act (1892) . . . . .	109, 110, 215, 221	Gaming Act 1835 . . . . .	233
Bills of Exchange Acts (1882-1917)	ix	Gaming Act (1845) . . . . .	233
Bills of Sale Act (1882) . . . . .	670, 671	<b>I</b>	
Bills of Sale Act (1878) . . . . .	670	Infants Relief Act (1874) . . . . .	100, 220
Building Societies Acts (1874-94)	153, 562	Irish Bank Act (1845) . . . . .	101
<b>C</b>		<b>J</b>	
Coinage Act (1929) . . . . .	99, 100	Joint-Stock Companies Act (1844)	135
Coinage Act (1891) . . . . .	99, 100	Judicature Act (1873) . . . . .	192
Companies Act (1862) . . . . .	8	<b>L</b>	
Companies Act (1879) . . . . .	8	Land Charges Act (1925) . . . . .	528, 644
Companies (Clause Acts (1845-89))	152	Land Registration Act (1925)	637, 641, 652
Companies (Consolidation) Act (1908) 8, 22, 112, 116, 124, 125, 135, 136, 138, 139, 140, 146, 149, 150, 153, 223, 223, 299, 557, 559, 645		Land Transfer Act (1875) . . . . .	641
Companies (Winding Up) Rules (1900) . . . . .	116, 542	Law of Property Act (1922) . . . . .	638
Conveyancing Act (1881) . . . . .	661	Law of Property Act (1925) 110, 196, 197, 386, 511, 517, 518, 634, 637, 639, 643, 645, 646, 648, 649, 651, 701, 704	
Currency and Bank Notes Act (1914) 54 (Note 1), 55, 101, 102, 103		Limitation Act (1623) . . . . .	196, 632
<b>D</b>		Limited Partnership Act (1907)	125, 132
Deeds of Arrangement Act (1914) . . . . .	528	Local Authorities Act (1908) . . . . .	156
<b>E</b>		Local Authorities (Financial Provisions) Act (1921) . . . . .	156, 158
Electric Lighting Clauses Act (1899)	152	Local Government Act (1888) . . . . .	156
<b>F</b>		Local Government Act (1894) . . . . .	166
<b>G</b>		<b>M</b>	
<b>H</b>		Merchant Shipping Act (1894) . . . . .	656
<b>I</b>		Money Lenders Act (1911) . . . . .	16
<b>J</b>		Municipal Corporations Act (1882)	156

## TABLE OF STATUTES CITED

P		PAGE	S		PAGE
Partnership Act (1890)	124, 125, 126, 127, 128, 130, 131,	626	Sale of Goods Act (1893)	. . .	114, 667
Policies of Assurance Act (1867)	. . .	606	Scotch Bank Act (1845)	. . .	101
Poor Law Acts (1601-1834)	. . .	156	Stamp Act (1853)	313, 314, 352, 477, 482, 489, 566	
Post Office Act (1890)	. . .	696	Stamp Act (1891)	164, 181, 238, 254, 259, 436, 684, <i>et seq.</i>	
Post Office Act (1908)	. . .	487	Statute of Frauds (1677)	. . .	118
Public Health Act (1875)	. . .	156	Statute of Frauds Amendment Act (1828)	166, 175, 180, 453	
R			Statutes of Limitation. See Limita- tion Act (1623) and Real Pro- perty Limitation Act (1674)		
Railways Clauses Act (1845)	. . .	152			
Real Property Limitation Act (1874)	580, 649, 650				
Registration of Business Names Act (1916)	. . .	124			
Revenue Act (1883)	332, 352, 361, 362, 476, 477, 478, 483, 566				
Revenue Act (1909)	. . .	684			
Revenue Act (1911)	. . .	684			
			T		
			Trade Union Act (1871)	. . .	154, 155
			Trade Union Act (1913)	. . .	155
			Trustee Act (1925)	. . .	111, 540, 541, 640

## TABLE OF CASES CITED

A	PAGE	E	PAGE
Akrokerri (Ashanti) Mines, Ltd. v. Economic Bank (1904) . . . . .	363	Eckstein v. Midland Bank, Ltd. (1926) . . . . .	589, 592
Att.-Gen. v. Mayor, etc., of West Ham and Others (1910) . . . . .	158	Elliot v. Bax-Ironside (1925) . . . . .	150
Att.-Gen. v. Tottenham U.D.C. (1910) . . . . .	158	<b>F</b>	
Attenborough v. Solomon (1913) . . . . .	545	Fenwick Stobart & Co., Re (1902) . . . . .	431
<b>B</b>		Fielding v. Corry (1898) . . . . .	427
Bain v. Gregory (1866) . . . . .	424	Fleming v. Bank of New Zealand (1900) . . . . .	171
Baker v. Nottingham Banking Co. (1891) . . . . .	108	Forster v. Mackreth (1867) . . . . .	259
Banbury v. The Bank of Montreal (1918) . . . . .	175, 180	Foxton v. Manchester & Liverpool District Banking Co. (1881) . . . . .	539
Barnet v. South London Tramways Co. (1887) . . . . .	148	Fuller v. Smith (1824) . . . . .	418
Bavins, junr., and Sims v. L. & S.W. Bank (1900) . . . . .	354	<b>G</b>	
Baxendale v. Bennett (1878) . . . . .	239, 383	Gaden v. Newfoundland Savings Bank (1899) . . . . .	334
Belfast Banking Co. v. Doherty (1879) . . . . .	220	Garrard v. Lewis (1882) . . . . .	238
Bird, <i>Ex parte</i> (1851) . . . . .	418	George, Re (1890) . . . . .	452
Bradford Old Bank v. Sutcliffe (1918) . . . . .	625	Giblin v. M'Mullan (1868) . . . . .	677
Brandao v. Barnett (1846) . . . . .	577	Goodwin v. Roberts (1875) . . . . .	336
Bromage v. Lloyd (1847) . . . . .	384	Gray v. Johnston (1868) . . . . .	539
Brook v. Hook (1871) . . . . .	235	Great Western Rly. v. London and County Bank (1901) . . . . .	105, 360
<b>C</b>		Greenhalgh v. Union Bank of Manchester, Ltd. (1924) 175, 514, 533, 579	
Capital & Counties Bank v. Gordon (1903) . . . . .	317, 363	Griffin, Re (1899) . . . . .	512
Carter v. White (1883) . . . . .	239	<b>H</b>	
Castell & Brown, Ltd., Re (1898) . . . . .	646	Hannan's Lake View Central, Ltd., v. Armstrong & Co. (1900) . . . . .	355
Caunt v. Thompson (1849) . . . . .	431	Hardy v. Woodroffe (1818) . . . . .	408
Chapman v. Smethurst (1909) . . . . .	149, 150	Hayman, Christy and Lilly, Ltd., Re (1917) . . . . .	559
Clutton v. Attenborough (1897) . . . . .	210, 263	Holt v. Markham (1923) . . . . .	345
Cocks v. Masterman (1829) . . . . .	346	Hopley v. Dufresne (1746) . . . . .	409
Cohn v. Baulkon (1920) . . . . .	457	House Property Co. of London v. L.C. & Westminster Bank, Ltd. (1913) . . . . .	358
Coleman v. The Bucks & Oxon Union Bank (1897) . . . . .	539	<b>I</b>	
Commissioners of Taxation v. The English, Scottish and Australian Bank (1920) . . . . .	106	Ingham v. Primrose (1859) . . . . .	383
Currie v. Misa (1875) . . . . .	231	<b>J</b>	
<b>D</b>		Joachimson v. Swiss Bank Corporation (1921) . . . . .	165, 168, 164, 312, 514
Danby v. Coultas (1885) . . . . .	517	John v. Dodwell (1918) . . . . .	538
Deeley v. Lloyds Bank (1912) . . . . .	169	Jones v. Coventry (1909) . . . . .	185
Dermatine v. Ashworth (1905) . . . . .	394	<b>K</b>	
Dey v. Pullinger Engineering Co. (1920) . . . . .	233	Kerrison v. Glyn, Mills & Co. (1912) . . . . .	347
		Kibble, <i>Ex parte</i> (1875) . . . . .	220
		King & Boyd v. Porter (1925) . . . . .	257

	PAGE		PAGE
Kirkwood v. Carroll (1903) . . . . .	482	Polak v. Everett (1876) . . . . .	630
Kleinwort v. Dunlop Rubber Co. (1907) . . . . .	347	Prosperity Ltd. v. Lloyds Bank, Ltd. (1923) . . . . .	165, 191
<b>L</b>		<b>R</b>	
Ladbroke & Co. v. Todd (1914) . . . . .	105, 357	Raphael v. Bank of England (1885) . . . . .	391
Landes v. Marcus (1909) . . . . .	360	R. E. Jones v. Waring & Gillow (1926) . . . . .	219
Leslie v. Sheill (1914) . . . . .	149	Richards, <i>Re</i> (1887) . . . . .	384
Lilley v. Rankin (1886) . . . . .	109	Royal British Bank v. Turquand (1856) . . . . .	556
Lindo v. Unsworth (1811) . . . . .	233	<b>S</b>	
Lloyd v. Ashby (1831) . . . . .	427	Sheffield v. Barclay (1905) . . . . .	595
Lloyd v. Howard (1850) . . . . .	394	Scholfield v. Earl of Londesborough (1896) . . . . .	237, 238, 414
London & Montrose Shipbuilding Co., Ltd. v. Barclays Bank, Ltd. (1926) . . . . .	383	Sheffield v. London Joint Stock Bank (1888) . . . . .	198
London & Provincial Bank v. Golding (1918) . . . . .	356	Shiells v. Blackburne (1789) . . . . .	677
London Joint Stock Bank v. Macmillan & Arthur (1918) . . . . .	488	Smith v. Cox & Co. (1923) . . . . .	318
London Joint Stock Bank v. Simmons (1892) . . . . .	171, 239, 268, 311, 414	Smith v. Prosser (1907) . . . . .	239
		Soltykoff, <i>Re</i> (1891) . . . . .	220
		Stewart v. Kennett (1809) . . . . .	423
		Stewart v. Westminster Bank (1926) . . . . .	294
		Sutters v. Briggs (1922) . . . . .	357
<b>M</b>		<b>T</b>	
M'Kenzie v. British Linen Co. (1881) . . . . .	310	Thairlwall v. G.N. Rly. (1910) . . . . .	475
MacTavish v. Michaels (1912) . . . . .	431	Tournier v. National Provincial Bank (1924) . . . . .	174
Macbeth v. North and South Wales (1906) . . . . .	253	Turner v. London and Provincial Bank (1903) . . . . .	355, 357
Mead, <i>Re</i> (1880) . . . . .	512	<b>U</b>	
Mendes v. Guedalla (1862) . . . . .	674	Underwood v. Bank of Liverpool & Martins (1924) . . . . .	355
Metcalfe v. Richardson (1852) . . . . .	424	Underwood v. Barclays (1924) . . . . .	163, 185, 317
Morison v. London, County & Westminster Bank, Ltd. (1914) . . . . .	356, 357, 358	<b>V</b>	
<b>N</b>		<b>W</b>	
Nash v. De Freville (1900) . . . . .	451	Walters v. Neary (1904) . . . . .	278
National Provincial Bank v. Glanusk (1913) . . . . .	615	Wauthier v. Wilson (1912) . . . . .	609
Norman v. Ricketts (1886) . . . . .	383	Whitehorn Brothers v. Davison (1911) . . . . .	667
North & South Wales Bank v. Macbeth (1908) . . . . .	210	Wigzell, <i>In Re</i> (1921) . . . . .	322
Nottingham Permanent Benefit Bdg. Soc. v. Thurstan (1903) . . . . .	109	Wood v. Clydesdale Bank (1913) . . . . .	511
<b>O</b>		Woolf v. Hamilton (1898) . . . . .	233
Oliver v. Hinton (1899) . . . . .	646	Wright v. Horton (1887) . . . . .	147
<b>P</b>			
Paine v. Bevan & Bevan (1914) . . . . .	265		
Parrs Bank v. Yates (1898) . . . . .	167, 632		
Patience v. Townley (1805) . . . . .	407		

PART I  
THE BANKER

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CHAPTER I

THE DEVELOPMENT OF BRITISH BANKING

TO-DAY it is generally recognised that British banking is unrivalled both for the efficiency of its organisation and for the soundness of its institutions, yet there can be little doubt that comparatively few people realise how much the industry and commerce of this country owe to the striking development and to the unique structure of its banking system. Trade, it is said, follows the flag; but trade cannot persist nor can industry thrive unless financial facilities, the sinews of commerce as well as of war, are correspondingly developed. In this respect Britain has been fortunate indeed, for side by side with her race of incomparable merchant seamen and pioneer traders she has produced a group of bankers and international financiers whose reputation for integrity and soundness of principle is second to none.

When, therefore, we pause for a moment to survey the intricate organisation and widespread operations of our banking institutions, it must appear to us remarkable that the functions of banking as we know them to-day are of comparatively recent origin. In fact, British commerce and industry had developed to a considerable degree before the foundations of our modern financial mechanism were laid. "Banking in the modern sense of the word", writes MacLeod,<sup>1</sup> "had no existence in England before the year 1640"; and, strangely enough, the first steps in the institution of our present banking system were taken, not directly to provide additional financial facilities for our growing industry and expanding commerce, but in order to safeguard the funds of wealthy City merchants against the depredations of an extravagant and unscrupulous monarch. To understand the circumstances which had so profound an influence on British financial and commercial history, we must briefly review the financial conditions of the country as they existed before and at the middle of the seventeenth century.

**Money Changing and Usury.**

Prior to 1640, as we have stated, banking as we know it to-day did not exist, but long before that time the function of money

<sup>1</sup> *Theory and Practice of Banking*, 6th Ed., vol. I., page 432.

lending, which is now so important a feature of banking operations generally, had been carried on for many centuries in London and other important trading centres of the world by rich merchants who made a profitable business of lending money at interest to those who were financially embarrassed. For a considerable period operations of this kind were conducted almost solely by immigrant Jews in this and other countries, and it is, in fact, generally accepted that the English term "bank" and its French equivalent "banque" are derived from the Italian word *banco*, meaning the bench or seat used by the Jewish money changers for the conduct of their business dealings in the various market-places.

As time went on, the business of money changing and money lending fell into widespread disfavour. The view became prevalent that any exaction of interest from a borrower was unjustifiable, and for a long period this contention was so strongly supported by the Church that in this and other countries usury or the lending of money at interest was forbidden. Other factors also combined to hinder its extension. Popular opinion, always ready to side with the weak against the strong, everywhere supported distressed borrowers against the undoubtedly exorbitant exactions of the wealthy and oppressive money-lenders, most of whom belonged to an alien and non-Christian race. So strong did this feeling become that in 1290 the Jewish money changers were expelled from this country.

But as industry and commerce developed, it became recognised that a properly conducted transaction for the loan of money for business purposes at reasonable rates of interest was of advantage to both parties, and that in the long run such operations were usually of greater benefit to the borrower than to the lender. Thus we find that, in spite of the Law and of the Church, and in spite of the weight of public opinion, money was lent for commercial purposes, and interest was charged and paid, until eventually it became recognised in all progressive states that transactions of this kind were justifiable and, indeed, indispensable in the business world.

Wealthy merchants in the rich trading states of Europe were not slow to take advantage of this change in the opinions of men, and we have records that in the thirteenth and fourteenth centuries traders from the Lombard States of Italy conducted a lucrative business in money changing and money lending in this and in other countries. Their mark exists to this day in our own country in the name of that most famous of all thoroughfares—Lombard Street, E.C.

### The Goldsmiths in the City.

These early financiers, who exchanged one currency for another and lent out some portion of their own capital at interest,

performed only a small part of the functions which we usually associate with a modern bank, and if their business was not always scrupulously honest, it nevertheless proved extremely profitable. Many of them settled permanently in the City of London, and progressive English merchants, impressed by the profits made in this new and growing business, were not slow to embark upon similar operations or to add such functions to their existing operations.

Thus, in course of time, the business of money changing and money lending in the City became vested in the hands of a number of wealthy individuals known as the *goldsmiths*. They combined with the money-lending operations we have described the functions of dealers in gold and silver bullion, a business which was in itself remarkably lucrative, if only by reason of the illicit profits made by the dealers in debasing the coinage and in withdrawing "good" coins from the currency in order to sell them by weight for export purposes. It is not surprising, therefore, that although the goldsmiths were wealthy and powerful, their methods of conducting business were subjected to considerable adverse criticism. A critic and probable victim undoubtedly expresses an opinion held by many of his contemporaries in the following statement, quoted by Professor Andréades<sup>1</sup>: "As for the goldsmiths, no one expects any reformation from them, or that anything will make them honest but a catchpole" (i.e., a constable).

### The Beginnings of Deposit Banking and of Bank Notes.

At this time there was no part of the operations of the goldsmiths corresponding to the business of receiving deposits, which forms so important a function of our modern banks, but in 1640 a political incident of comparatively minor importance instituted a great change and was destined to have far-reaching consequences. Prior to this time the merchants in the City had been satisfied to leave their money and valuables under Crown protection at the Royal Mint in the Tower of London; but, when in 1640 Parliament refused to grant Charles I. supplies for the maintenance of his army, the existence of the hoard proved too great a temptation for that unscrupulous monarch, and apprehensive of impending ruin, he caused widespread consternation and indignation by seizing £130,000 in bullion which had been deposited at the Tower by the City merchants.

Although the money thus appropriated was ultimately repaid, it can easily be imagined that the merchants immediately sought for a more secure place of deposit for their treasure. The strong-rooms of the goldsmiths offered undeniable attractions, and consequently the merchants resorted to the practice of leaving their money and valuables with the goldsmiths for safe keeping,

<sup>1</sup> *History of the Bank of England*, page 22.

receiving in return signed receipts called "goldsmiths' notes", which embodied an undertaking by the goldsmiths to return the money or valuables to the bearer upon demand.

These early receipts were, in fact, the forerunners of the modern bank note, and in succeeding years the disturbed political conditions of the country, culminating in the Great Rebellion, led to a great extension of their use. Thefts of money by employees and depredations by state officials and rival political partisans became frequent, and consequently citizens generally found it expedient to adopt the practice of depositing their surplus money with the goldsmiths.

### The Granting of Loans at Interest.

As might be expected, it was not long before the goldsmiths discovered that, of the considerable sums left with them for safe custody, only a small proportion was required at any one time to meet current withdrawals and probable demands. Moreover, they found that they could without difficulty employ much of the capital, which they received at very low rates of interest or even for nothing, in discounting bills or in making advances at comparatively high rates. Thus they borrowed from some persons in order to lend to others, and so profitable did these new operations become that the goldsmiths aimed at inducing deposits of money by offering attractive rates of interest and by permitting the depositors to withdraw their balances without notice.

The profits and the power of the goldsmiths were enhanced by yet another development, for, provided their credit was sufficiently good, they resorted to the practice of making loans by the issue to borrowers of signed "notes", embodying a promise to pay upon demand a fixed sum of money. Such notes were, of course, almost entirely on a par with present-day bank notes; they passed freely from hand to hand and were accepted in discharge of obligations by merchants and others who were in a position to recognise the signatures as being those of "bankers" of sound credit and established reputation.

The goldsmiths were thus applying themselves in an increasing degree to the more important functions of a modern bank. Many of them forsook their original operations of money changing and dealing in bullion, while most of them became remarkably wealthy and of outstanding importance in political and commercial spheres. "Five or six stood pre-eminent among their brethren, and Clarendon says that they were men known to be so rich and of so good reputation, that all the money of the kingdom would be trusted or deposited in their hands. *And they then first came to be called Bankers*".<sup>1</sup>

The last sentence is of peculiar significance, and will be referred to again at a later stage, but here we may note that it

<sup>1</sup> MacLeod, *op. cit.*, page 437.



epitomises the popular conception of the essential function of a bank, i.e., *the acceptance of funds on deposit upon the understanding that such funds may be withdrawn at any time by the depositors.* Thus began the business of borrowing in order to lend again, which is the chief characteristic of modern banking; but for more than a century this function consisted almost entirely in the issue to both depositors and borrowers of notes payable to bearer on demand. The system of banking which involves the cheque and the current account had yet to come into existence.

### **The Foundation of the Bank of England.**

Unfortunately, the business conducted by the goldsmith-bankers was frequently subject to flagrant abuse. In many cases exorbitant rates of interest were demanded for loans, no guarantee for the safety of their funds was given to depositors, while advances were often made to persons of no financial solidity. As a result, the history of banking in the seventeenth century was marked by a constant succession of failures which caused widespread distress amongst depositors.

It is not surprising that under such conditions people sought for a remedy in the establishment of a central institution on the lines of the successful central banks already existent in Venice, Amsterdam and Genoa, whose functions were to control the note issues and to regulate the prevailing rate of interest.

The necessity for the foundation of a central bank was accentuated, too, by the financial embarrassment of the monarchy and government of the period. The rise of the goldsmith-bankers and the appropriation by Charles I. of the money of the London merchants had led to a series of loans to the reigning monarch from the wealthy bankers in the City. There was, however, little security for such advances beyond the word of the king or of his ministers, and when the constant wars of William III. led to acute financial embarrassment and to a constant succession of loans, it became evident that there was urgent need for placing borrowings of this kind upon a more definite and secure footing. A number of schemes were suggested, and the outcome was the adoption of the plan of William Paterson, a Scotsman, resulting in the formation of the Bank of England in 1694.

### **The Beginnings of Joint Stock Banking.**

The foundation of an institution which was to become the foremost of the world's financial organisations was in itself an event of lasting importance. But there were also other reasons which made the birth of the Bank of England a landmark in our banking history. In the first place, the Bank was the first joint-stock banking institution to be established in this country,

for the pioneers, who were drawn from the ranks of the goldsmith-bankers in the City, formed themselves into a corporation with a capital of £1,200,000, which sum was lent to the government of the day at 8 per cent. interest. Furthermore, in return for thus relieving the financial embarrassment of the king and his ministers, the Bank was granted a number of special privileges, of which the most important was the power to issue notes payable to bearer on demand up to the amount of the loan made to the State.

The close relationship between the new undertaking and the government was in itself sufficient to warrant its success, and during succeeding years it steadily increased in wealth and power, its virtual monopoly of joint-stock banking being strengthened by an Act of 1708 which forbade the issue of notes by any other corporate bank and confined the issues of private banks to those with not more than six partners. This restriction had the natural result of limiting competition from organisations of any magnitude, and accentuated the tendency for local note issues to be made throughout the country by small private banks, many of which were badly conducted and took full advantage of the absence of any rigid control over their operations.

### The Birth of the Cheque System.

The structure of the banking system of the country at the end of the eighteenth century is only mildly described as unsatisfactory. Already there were portents of the mighty forces which were to be loosed by the Industrial Revolution, and probably in no other respect was the country less ready to meet the vast demands upon its equipment than in the sphere of financial organisation. In London was the Bank of England, a state-protected institution with a strong note issue and a complete monopoly of joint-stock banking in the metropolitan area, together with a number of small private banks hampered in their activities by the competition of their powerful and favoured rival. In the provinces, local needs were catered for by a multitude of small banks, which, by the nature of their business and organisation—all too frequently hampered by inefficiency—were quite incapable of taking a national view or of meeting any extraordinary demands upon their resources.

Happily for the future of the nation, necessity, as always, proved stronger than law and established practice. The London private bankers, impelled to find some means for retaining their business in face of the competition of the Bank, and anxious to provide increased facilities for the rapidly growing industries of the country, resorted about 1780 to a practice which was destined to oust even the Bank of England note from its supremacy; they began to issue printed forms of *cheques*, by the use of which depositors could withdraw upon demand such amounts as they

required, or by means of which they could instruct their bankers to make payments to third parties.

To all intents and purposes these early cheques were similar to those which exist to-day, with the important difference that they were invariably made payable to *bearer* on demand, a clear indication of the fact that the cheque had its origin in the desire of the London banks to circumvent the growing strength of the Bank of England, so largely dependent upon its practical monopoly of the right of note issue in London.

The new system proved a complete success, and when a clause in the Bank Act of 1833 permitted the establishment in London of joint-stock banks for all banking business except note issuing, a number of corporate banks were formed with the principal object of accepting deposits withdrawable on demand by cheque. Seven years previously, the Bank Act of 1826 had introduced an important modification of the monopoly of the Bank of England in a clause permitting the establishment of joint-stock banks of issue with *unlimited* liability outside a radius of 65 miles of London, and as a result several important joint-stock banks were formed in the larger provincial towns.

But the Bank Charter Act of 1833 marked the beginning of a new banking era because it gave rise to an entirely new class of banks, best described as *banks of deposit* in contradistinction to the old-established class of *banks of issue*; it may, in fact, be said to have instituted the modern system of deposit banking in this country.

Undoubtedly the subsequent rise of Britain to the financial and commercial leadership of the world is attributable, in no small degree, to the institution of the cheque system, and to the persistence of the early joint-stock banks in developing their new business in the face of considerable opposition from the private bankers and the Bank of England, and in spite of widespread suspicion on the part of the public generally and of the difficulties which inevitably attend inexperience.

### **The Application to Banks of the Principle of Limited Liability.**

As has been indicated, the Act of 1833 marked the beginning of a new and prosperous era for banking in this country, and it was almost immediately followed by the establishment of a number of institutions, some of which were destined to develop into those vast concerns known as the "Big Five", which, by the extent of their business and the magnitude of their funds, to-day rank among the world's largest financial organisations.

One further step was necessary, however, before the banking organisation could develop to its full extent and obtain sufficient capital to enable its facilities and operations to keep pace with the rapid growth of industry and commerce. This was the

application to the banks of the principle of *limited* liability, which had been extended to trading companies by an Act of 1855. To realise the importance of this development it must be remembered that the early joint-stock banks were really large co-partnerships, the members of which were liable to the full extent of their property for the debts of their firm. Naturally, with deposit banking merely in its infancy and failures by no means uncommon, investment in bank shares offered little attraction either to the very wealthy or to the man of moderate means. These facts were gradually recognised, and by an Act of 1858 the principle of limited liability (for all debts other than those on bank notes) was first applied to joint-stock banks, the provision being subsequently re-enacted in the Companies Acts of 1862 and of 1908.

### The Principle of Reserve Liability.

The joint-stock banks were now firmly established much on the same basis as they are to-day, but, as so frequently happens in similar circumstances, the imposition of a sudden strain on a section of the banking organisation revealed an important weakness in the fabric.

Following the trade depression of the years 1873-78 and the Russo-Turkish war, there were a number of important failures in this country, including that of the City of Glasgow Bank in 1878, with liabilities of six millions. The widespread ruin which ensued among the bank's depositors, and especially among its shareholders, whose liability for its debts was *unlimited*, directed attention to the need for some provision which would ensure a greater degree of stability and security in banks and other companies conducting financial operations.

Accordingly, an endeavour to remedy matters was made in the Companies Act of 1879, the provisions of which were subsequently re-enacted in the Companies (Consolidation) Act of 1908. Under this Act, the existing law relative to the publication of the accounts of banks and insurance companies was extended and strengthened, while, with the object of further safeguarding bank depositors and shareholders, it provided that an existing limited company, or an unlimited company which proposed to register itself as limited, could by resolution increase the nominal amount of its shares so that a certain amount over and above that paid up on each share could be called for *only in the event of the winding up (i.e., liquidation) of the company*, or that such a company could determine by special resolution of its shareholders that a portion or the whole of its existing *uncalled* capital could be called up *only in the event of the liquidation of the company*.

The advantages of such an enactment are almost self-evident. On the one hand, shareholders in a limited joint-stock bank which has created reserved liability in accordance with the pro-

visions referred to, understand exactly the extent of their liability for the debts of the concern, while the holding of partly unpaid shares in such a bank tends naturally to become confined to persons who are in a position to accept the liability for the uncalled capital if the need should arise. On the other hand, depositors are further secured by the existence of an uncalled reserve upon which the bank can fall back in the event of its liquidation or winding up. It is, therefore, easily understood that the majority of banks in this country have availed themselves of the provisions mentioned and have established what is described as a "reserve capital".

### Characteristics of Modern Banking.

The Act of 1833 not only opened up a new era of prosperity for our banking institutions. It may also be said to have changed the whole basis upon which the British banking system had been built and developed. Until about the middle of the nineteenth century banking in this country consisted chiefly in the issue of notes by the Bank of England and a number of small local banks. Reserves were what each bank thought fit to keep, and were necessarily maintained at the local head office in the area of each bank's activities. One of the principal results of the development of the cheque system, however, was a decrease in the public need for bank notes, and as the popularity of the cheque increased so did that of the bank note gradually decline.

People soon realised that not only was the cheque far safer to use and to carry about—as its loss or destruction did not involve the owner in monetary loss—but also that it enabled the drawer to make large or small payments with the minimum of trouble and delay, providing him at the same time with an automatic receipt for his disbursements.

From the standpoint of the banker, also, the extension of the cheque system offered undoubted advantages. So rapidly did the use of current accounts increase in public favour that there was a constant addition to the total amount of funds left with the banks *free of interest*, in return for the right of withdrawal by cheque on demand, and as the number of accounts and the amount of the funds increased it became apparent that reserves could be centralised and a greater proportion of each banker's assets loaned to borrowers or invested in profitable securities.

Furthermore, the small local note issuing banks found themselves at a disadvantage in competition with the growing joint-stock deposit banks, and as time went on it became increasingly clear that the new deposit and cheque system could be developed in the highest degree by large institutions which had either grown up independently or had been formed by the concentration under one directorate of the resources and reserves of several smaller concerns. The issue of notes had thus assumed a secondary

importance in the business of banking, and this was so even in the case of the Bank of England itself, although, as we shall see later, that institution, by virtue of the provisions of the Bank Charter Act of 1844, was gradually obtaining a monopoly of the right to issue bank notes in England and Wales, and was consolidating in other directions its long-established supremacy among the world's financial institutions.

### Concentration by Absorption and Amalgamation.

Consequently, we find that the most important feature of banking history in the later years of the nineteenth century and in the early years of the succeeding century, was a succession of absorptions of smaller banks by larger institutions. Many of the small local private banks were absorbed by the larger joint-stock banks with head offices in London, the general result being to provide the latter with a wider field from which to draw deposits for their profitable loaning operations in the large manufacturing centres. On the other hand, large provincial banks were led to absorb smaller London institutions by the necessity of possessing a head office in London in order to obtain admission to the Clearing House and generally to compete on equal terms with the large London banks having provincial offices. This absorption of small banks by larger institutions has now practically ceased, but it may be noted that the absorption by Lloyds Bank in 1921 of Fox, Fowler & Co., of Wellington, Somerset, marked the disappearance of the last private country bank to retain the right of note issue in England and Wales:

It was not, however, until quite recent years, and particularly during 1918-20, that the tendency to the concentration of banking resources developed to its greatest extent. This period was marked by a series of *amalgamations* between several of the large joint-stock banks which have resulted in the establishment of institutions of unprecedented size. In spite of the fairly obvious advantages following this policy—particularly the saving in administrative expenses, the greater possibility of concerted action, and the greater degree of efficiency and uniformity—the remarkable size and power of the new organisations caused some degree of uneasiness in commercial circles, with the result that in 1918 a Treasury Committee was appointed to investigate the matter. The Report<sup>1</sup> of this Committee dealt exhaustively with the advantages and disadvantages of the process of amalgamation, and its recommendation was ultimately adopted that the sanction of the Treasury should in future be obtained before any further amalgamations were effected. No legislation was passed with this object, but the banks were placed under a strong moral obligation to submit any proposed schemes to the Treasury Advisory Committee on Bank Amalgamations. Apparently,

<sup>1</sup> *Report of the Committee on Banking Amalgamations, 1918.*

however, the view has prevailed in official quarters that the safety limit in the size of our banking institutions has now been reached, for in 1924 the Chancellor of the Exchequer announced in the House of Commons that no further amalgamations among the existing joint-stock banks would be permitted.

### The Expansion of Branch Banking.

It was only to be expected that as the banking system became concentrated in the hands of a small number of powerful institutions, competition for business should become increasingly keen, and this has been nowhere more strikingly evidenced than by the establishment throughout the country of branches or agencies of the large organisations operating chiefly from London. Thus the direction and management of the banking organisation have become centralised, and following the extinction of the private banker with his local interests and sentiment, there has been a loosening of old-established ties between the local banks and the people and industries of the relative areas.

To some extent the "Big Five" have endeavoured to counteract this tendency by the formation of local directorates in various districts, but the large banks are essentially cosmopolitan—their interests lie everywhere, they have no marked sentiment for a particular district or for the needs of a great local industry, and as between the rival organisations there is no longer any question of what is colloquially termed "poaching on another's preserves". Thus in almost every town and village of any importance we now find branches or agencies of two or more of the "Big Five". The banking traditions of the Victorian era have been submerged in the keen rivalry for business and in the race to tap as wide a field as possible. Apart from sentimental considerations, such developments must ultimately redound to the benefit and convenience of customers, who cannot fail to derive advantage from the cheaper and constantly extending facilities afforded by the large competing organisations.

The following figures<sup>1</sup> relating to the period 1883-1921 are illustrative of the remarkable effect on our banking organisation of the process of amalgamation and absorption, combined with the extension of the branch system. It will be seen that they demonstrate a striking decrease in the number of banks but a considerable increase in the number of offices:—

Year.	No. of Banks.	No. of Offices.	Inhabitants per Office.
1883	317	2382	11,315
1891	261	3231	8,915
1901	172	4872	6,676
1911	99	6413	5,630
1921 <sup>2</sup>	40	8022	4,722

<sup>1</sup> Figs. for 1883-1911 after Mr Jas. Dick, *Jour. of the Institute of Bankers*, vol. xiii., quoted by Sykes, "Banking and Currency," 5th Ed., p. 95.

<sup>2</sup> Figs. for 1921 exclude London offices of various banks.

## The Expansion of English Banks to Other Countries.

Until recent years English banks were noted for the peculiar conservatism of their methods as compared with those of foreign banking institutions, and particularly in so far as they had not previously attempted to establish their own branches in other countries. For a long period of years foreign banks have had branches in London and other world centres, but prior to 1911 the interests of English banks in places outside this country were entirely served through the agency of foreign institutions. In the past this policy applied even to the neighbouring countries of Scotland and Ireland, and it was consequently a marked departure from established practice when certain leading English banks opened branches in important continental towns, and followed this up by obtaining direct representation in Scotland, Ireland, and other countries by fusions with established banks in those countries.

The most recent development in overseas expansion took place in August 1925, when the Colonial Bank, the Anglo-Egyptian Bank, and the National Bank of South Africa were merged into one institution known as Barclays Bank (Dominion, Colonial, and Overseas), Ltd. This latest move seems to open a new chapter in the history of joint-stock banking, and to presage future developments on an even more extensive scale. Just as the last few years have witnessed the virtual concentration of banking interests in this country into the hands of the "Big Five", so it may well be that in the comparatively near future we shall see the emergence of a huge consolidated Empire banking system.

Such a development seems to be the natural outcome of general economic conditions. The evolution of domestic industry called for a strengthening and consolidating of internal banking resources; to-day, the expansion of international trading relationships, together with the keenness of competition in international markets, demands that the fullest financial facilities shall be available not only for purely domestic but also for international business.

Already the needs of this new situation have been partially met by the policy of our big banks (with the notable exception of the Midland) of acquiring interests in, and establishing working arrangements with, overseas banks, both colonial and foreign, but it is being realised that in this, as in other spheres, economy demands consolidation as well as expansion.

Numerous advantages might be realised—the essential function of gathering deposits and directing them into productive channels of employment could be more efficiently rendered by the widening of the sphere of operations, while a consolidation of Empire banking resources would undoubtedly tend to closer economic relationship between the various parts of the Empire.



At the same time, however, the development is exposed to the dangers which inevitably accompany amalgamation in industry. There is a loss of personal touch, a tendency to stereotyped and unenterprising policy, while if the advantages of consolidation are to be fully realised, increasing attention will have to be paid to the problem of management.

### The Development of the Central Reserve System.

One other important characteristic of modern English banking remains to be noted at this point, although it will be discussed at length in a later chapter. This is the unique arrangement whereby the liquid cash reserves of the great banks have come to be concentrated in the hands of the Bank of England, which thus acts as the bankers' bank and has almost automatically attained a position of pre-eminent importance among the banks of the world. This feature is the more striking when it is remembered that the Bank of England is a *private* organisation run for profit by its shareholders and management. No legal provision has compelled the other banks to leave their reserves in its keeping—the matter is one largely of convenience, but nevertheless of remarkable efficiency and proved safety. Consequently, although projects have many times been put forward for the formation of an independent bankers' reserve, the Bank of England has retained its position as keeper of the nation's ultimate holding of cash and as guardian of the liquid balances of all the other banks. This it has done in spite of the fact that in most other countries banking policy is determined by a central bank which is under government direction, and which is able to exercise fairly definite control over all other banking institutions, particularly so far as interest rates and foreign exchange operations are concerned.

### Per Ardua. . . .

In the foregoing pages, we have briefly traced the development of banking in this country from its origin in the simple operations of the money changer and money lender, trading with his own capital of a few pounds among a strictly limited local clientèle, to the vast modern institution conducting a most complicated, extensive, and profitable business with millions of pounds' worth of capital and far more millions of depositors' funds, borrowed from shareholders and customers throughout the length and breadth of the country,—one might almost say throughout the world.

The development is truly a remarkable one, but it has been achieved only as the result of persistent effort in the face of constantly changing economic conditions, and only with experience born of bitter failure and won in many a stubborn

conflict with economic forces. The business methods of the money changers, goldsmiths, and private country bankers were doubtless open to considerable criticism, but they nevertheless proved reasonably adequate to the needs of the country at the time. Further than this, these early bankers proved themselves capable of transition and growth to meet the changing demands of a rapidly developing community; and if each in turn had ultimately to be entirely superseded, nevertheless each contributed in tradition, if not in organisation, to the eventual establishment of those banking and financial institutions which are to-day the pride of every Briton.

## CHAPTER 2

### THE NATURE AND FUNCTIONS OF A MODERN BANK

THE brief historical survey in the preceding chapter will have served one important purpose if only it has enabled the reader to form a correct estimation of the essential functions of a bank in this country at the present time. That such an estimation should be necessary becomes apparent when it is pointed out that, in spite of the paramount importance to the community of its banking institutions and of its banking system generally, there exists, in this country at any rate, no helpful accepted legal definition of what exactly constitutes a bank.

#### What is a Bank ?

The only statutory definition of a bank at present existing in Britain is that given by Section 2 of the Bills of Exchange Act, 1882, to the effect that "a banker includes any body of persons, whether incorporated or not, who carry on the business of banking".

Not only is this definition vague and ambiguous, for it gives no indication of what is comprised in "the business of banking", but also it serves to emphasise the surprising fact that, in spite of the unique power and opportunities to defraud the public offered by the business of banking, practically any individual, or any group of individuals, may set up an ordinary deposit and banking business in this country and be subjected to comparatively little interference or legal restriction.

Consequently, it is easily understood that current banking and legal opinion has long been in favour of action by the legislature to define clearly the exact functions of a bank, and to prevent the indiscriminate use of the term by individuals and corporations whose business is not conducted in accordance with sound banking principles.

In the absence of such legal guidance, well-known banking authorities have from time to time sought to provide a precise definition of the term "banker", and possibly the best known and most widely recognised of such definitions is that of Hart,<sup>1</sup> which runs as follows :—

"A banker is one who, in the ordinary course of his business, receives money, which he repays by honouring the cheques of the persons from whom or for whose account he receives it".

<sup>1</sup> *Law of Banking*, page 1.

The reader will observe at once that this definition regards as an essential function of a banker *the acceptance of deposits of funds withdrawable upon demand by cheque*, a view which has quite recently received official support in a memorandum issued by the Ministry of Labour to the effect that the expression "bank" shall be construed so as to include only those institutions where "a substantial part of the business consists of the receipt of money on current account, to be drawn upon by cheques".

The business of a modern banker in this country is thus centralised around the use of the cheque, and it is this characteristic feature of British banking which has until recently distinguished it from banking in all other countries, and which also distinguishes banking as conducted in Britain from all other forms of business. It follows, too, that the frequently used definition of a banker as "a dealer in money and credit" is not entirely satisfactory, for it is clear that there are many forms of financial business other than banking which may be said to deal in money and credit, as for example the business of a money-lender, who lends money on the "credit" or reputation for solvency of the borrowers or their sureties. In fact, the business of a money-lender is so closely allied to that of banking, that in the Money Lenders Act, 1911, the legislature has deemed it necessary to provide that no person shall be registered as a money-lender under any name which includes the word "bank" or which implies that such person conducts a banking business.

But while the definition in the preceding paragraph is not sufficiently limitative, it must be remembered that a banker is essentially a dealer in money, whether it exists in the form of bank notes, coin, or currency notes, and that he is also a dealer of considerable magnitude in "credit", existing in the form of *credit instruments*, such as bills, promissory notes, cheques, and stock exchange securities, each of which represents a *debt* or liability owing by one person (the *debtor*) to another person (the *creditor*, or holder of the credit), or existing merely as a *book credit*, i.e., an account setting forth the debt or liability of one person to another. The system of *giving credit* is, in fact, the foundation of a banker's business and the source of the greater part of his profits. He *borrow*s large sums on deposit from a multitude of customers (to whom he thus becomes a *debtor*), and *lends* a considerable proportion of such borrowings to other customers who require overdrafts. In other words, a bank's deposit customers give the bank *credit*, and the bank in turn gives credit to its debtor customers. The banker is thus an intermediate party between the borrower and the lender. He borrows from one class of persons and lends to others, dealing in credit the whole time, and making his profit out of the difference between the rate at which he borrows and the rate at which he lends.

## Functions of the Modern Banker.

If we accept Dr Hart's definition of a bank, it is clear that, in this country at any rate, a banker's main function is the receipt of money from his customers, subject to their right to withdraw such money on demand by cheque. This, of course, is the usual arrangement under which *current accounts* are opened and conducted, but in addition to accepting vast sums of money on these terms, the banker usually receives even more on *deposit account*, undertaking to pay the customer an agreed rate of interest upon the balance outstanding in return for the right to demand from him an agreed period of notice for all withdrawals. Thus, the bulk of the funds so deposited are accepted subject to seven days' notice of withdrawal, and although in practice banks rarely insist on fulfilment of this condition except in the case of very large sums, the stipulation is nevertheless an important safeguard in the event of the bank having to face exceptional withdrawals. (See Chapters 3 and 4.)

Arising out of this function of accepting money from the public is that whereby the banker lends against security or gives credit to borrowers in various ways, as by granting them overdrafts on current account or fixed loans on loan account, or by discounting for them bills of exchange and promissory notes.

Thus it will be seen that the main function of a modern banker is actually a dual one—he borrows with one hand in order to lend with the other; and this essential feature of his business remains the same whether the bank is a vast joint-stock organisation, with a wealth of resources and a network of branches and agencies, or a comparatively small private bank, or “a pioneer bank in a new country, with a stock-in-trade consisting of a tent, a safe, a trestle table, and a revolver”<sup>1</sup>. While both aspects of this function are necessarily important, it is no doubt true to say that the banker's solvency and the successful conduct of business depend essentially upon his ability to “give credit” and upon the judgment which he displays in lending to others that which he himself has borrowed.

Apart, however, from this primary function of linking up lenders and borrowers of liquid capital, the modern banker performs a host of other functions all of which are of considerable utility to his customers and to the community generally. The majority of such functions were originally undertaken by the banks solely for the convenience and benefit of their extensive clientèle, although they have naturally reacted to the greater efficiency and greater profit of the banks themselves.

We may usefully distinguish these additional functions into two main groups, viz.: (1) *Agency services*, and (2) *General Utility services*. The former comprise the services of the banker in collecting and paying cheques, bills, promissory notes, coupons,

<sup>1</sup> *The Banker as a Lender*, by F. E. Steels.

dividends, subscriptions, and insurance premiums as a *special* agent on behalf of his customers ; in conducting stock and share transactions in respect of which the banker, as agent, shares the commission with the stock exchange broker ; in acting in various other agency capacities, such as those of trustee, attorney or executor, and as agent, correspondent or representative of his customers, other banks and financial houses either at home or abroad.

The general utility or miscellaneous services which the banker performs are even more numerous, and include (a) the issue of various forms of credit instruments such as bank notes (now confined in England and Wales to the Bank of England), letters of credit, travellers' cheques and circular notes, all of which, in effect, enable the customer to benefit from the banker's reputation for solvency and prompt payment ; (b) the transaction of foreign exchange business—the modern counterpart of the ancient business of money changing—which, while it brings considerable profit to the banker, provides the business community with invaluable facilities for its dealings with foreign nationals ; (c) the acceptance of bills of exchange, another function whereby the banker lends his name to others in return for a commission and thus enables the customer to "trade" on the banker's superior credit ; (d) the safeguard against fire and theft of valuables and important documents in his specially constructed strong rooms, a function which makes the banker a *bailee* of the goods entrusted to his keeping ; (e) the distribution throughout the country of supplies of legal tender currency, with the related duties which banks have assumed of withdrawing from circulation light coins, which are returned to the Mint for recoinage, and defaced notes, which are returned to the Bank of England for replacement ; and, finally, (f) acting as referee as to the respectability and financial standing of his customers, a function which is not only very helpful to the banker himself but is also of considerable value to business men generally, furnishing them with reliable and speedy information as to the general standing of people with whom they are dealing, and enabling them to avoid incurring loss through giving credit to persons of little or no financial worth.

### The Utility of Banking.

A consideration of the functions discussed in the preceding paragraphs will indicate at once that bankers render services of inestimable value to the trade and industry of the country. In acting as intermediaries between large numbers of depositors or lenders on the one hand and of equally numerous borrowers on the other, banks may be regarded as great reservoirs of capital into which flow countless small streams of liquid funds, and from which are distributed throughout the country, at the times when they are most needed and in the places where they can be most

efficiently used, supplies of productive capital rightly regarded as sources of further wealth. Countless small sums of money are rendered productive which would otherwise remain in "idle hoard", and in this way the banking organisation assists the transfer of the wealth of large and small capitalists in a rich locality to other areas where that wealth can be efficiently and profitably employed, to the ultimate benefit of the community as a whole. The facility with which loans can be obtained from banks acts as a stimulus to production and as an incentive to industrial enterprise. Manufacturers and traders know that they can rely upon the banks for sound advice and financial accommodation at difficult periods, while the banks, by a judicious regulation of credit, perform an economic function of first importance in checking speculation and preventing financial crises.

But although the banks thus *mobilise* capital, and make its use more effective, they do not *create* capital. As every student of Economics is aware, capital comes from a surplus of production over consumption: the banker by granting advances, does not directly increase that surplus. The only sense in which an expansion of credit may be said to be a creation of capital is in that the banker increases the proportion of purchasing power which is devoted to capital uses. By granting additional advances the banker increases the *volume* of purchasing media, but at the same time he reduces the proportion of general purchasing power which is devoted to ordinary consumption, i.e., he enforces saving and turns the use of the capital saved into productive channels.

Moreover, the existence of a sound and competitive banking system is in itself an encouragement to saving, thrift and economy. The small depositor is brought to appreciate the facilities for safe investment which the banks provide, and thus we find that in a modern community even the poorer classes become imbued with feelings of security and prosperity, and cherish ambitions of one day running an account at the Post Office Savings Bank if not at an ordinary joint stock bank.

Lastly, in Gilbert's<sup>1</sup> phrase, bankers act as "public conservators of the commercial virtues". In their own interest "they encourage the industrious, the prudent, the punctual, and the honest—while they discountenance the spendthrift and the gambler, the liar and the knave. They hold out inducements to uprightness, which are not disregarded by even the most abandoned. There is many a man who would be deterred from dishonesty by the frown of a banker, though he might care but little for the admonitions of a bishop".

Conditions such as these must ultimately react on the general well-being of the community, and when it is remembered to what extent time, money, and labour are saved by the cheque system

<sup>1</sup> *The History, Principles and Practice of Banking*, vol. i., pp. 226-227.

and by the general utility services of our banking institutions, it will be readily conceded that a country with a sound banking system is possessed of one of the firmest foundations of prosperity.

### The Classification of Banks according to Functions.

While the functions which we have described in the foregoing pages are generally common to all banks operating in Great Britain at the present time, it is nevertheless possible to distinguish a certain degree of specialisation among the various banking institutions which enables us to classify them according to the nature of the business which they principally transact.

**THE BANK OF ENGLAND.**—First must be mentioned the Bank of England, by virtue of the circumstances of its foundation and of its subsequent rise to predominance in a class of its own. In addition to conducting all the usual functions of a modern bank (except the acceptance of bills), it acts as banker to the State and to all the other banks in the country, accepts responsibility for the safeguarding of the nation's ultimate cash reserve, undertakes the control of the currency and the regulation of the prevailing rate of discount and of the foreign exchanges, and, finally, enjoys a monopoly of the right of issuing bank notes throughout England and Wales.

**THE "BIG FIVE".**—In the second class are included the large joint-stock banks with head offices in London, usually referred to as the "Big Five", viz., the Midland, Lloyds, Barclays, the Westminster, and the National Provincial. Each of these is characterised by the wealth of its resources and by the vast extent of its business, both of which rival those of any other financial organisations in the world. Furthermore, all the banks in the group have a similar history, in that each institution has been built up to its present size by a series of absorptions and amalgamations with other banking concerns.

The business conducted by each member of the "Big Five" differs in no essentials from that of the other members, and is typified by such a persistent policy of extending the sphere of business by the establishment of new branches that it appears as if the system of branch banking in this country must have almost reached the limits of healthy and profitable competition.

**JOINT-STOCK BANKS WITH SPECIALISED FUNCTIONS.**—Banking, like all other great businesses, has not remained free from the tendency to *specialisation* or division of labour, which is nowadays to be found side by side with the concentration of resources in most economic spheres; and in Britain particularly there are several notable instances of the performance by certain banks of business of a specialised kind. In this group may be mentioned, first of all, the well-known banks of the Lancashire district, which cater for the special needs of our great cotton



and allied industries and which have their head office in one of the large Lancashire towns. Among these are Williams Deacons Bank, the Lancashire and Yorkshire Bank, the District Bank, the Manchester and County Bank, all with head offices in Manchester, and the Bank of Liverpool and Martins, with its head office in Liverpool. Each of these banks conducts business on much the same lines, although not on the same scale, as the "Big Five", but in the nature and sphere of their business all the banks in this class are characteristically associated with the great industries of Lancashire.

In the same group may be included the Scotch and Irish banks, specialising in business with Scotland and Ireland respectively, and characterised by the power which most of them possess to issue notes in denominations of one pound and upwards, which are legal tender in their respective countries.

To the above we may also add such institutions as the British Overseas Bank and the British Bank for Foreign Trade, specialising in the financing of overseas trade; the Yorkshire Penny Bank, catering for the poorer classes in the Yorkshire manufacturing centres, and the Birmingham Municipal Bank, accepting small deposits from the working class population and applying the funds for municipal purposes.

**PRIVATE BANKS.**—The fourth class is now mainly of historical importance, as there remain only two important representatives—Messrs Glyn, Mills & Co. and Messrs Charles Hoare & Co.—of the once numerous class of old-established private banking firms which conducted business either as private bankers in the country, or in London itself as West End bankers<sup>1</sup> or Army agents,<sup>2</sup> or which conducted a city business very similar to that of the joint-stock banks, as in the case of Glyn, Mills & Co.

**THE DOMINION AND COLONIAL BANKS IN LONDON.**—These form the fifth class of banking institutions which may be distinguished by reason of their characteristic functions. In this group we have, firstly, the banks which specialise in business with the self-governing Dominions—Canada, Australia, New Zealand and South Africa—acting as financial agents for the Dominion governments and undertakings, and conducting most of the exchange business between London and the Dominions. Some of these banks, such as the Bank of Australasia and the National Bank of New Zealand, have head offices in London, but their branches and the bulk of their business are located in one or more of the Dominions overseas. In the second subdivision of the group are the Eastern Exchange Banks, such as the Chartered Bank of India, Australia and China, and the Hong-Kong and Shanghai Banking Corporation, which are engaged primarily in the conduct of banking business (particularly bullion

<sup>1</sup> E.g., Coutts & Co., now a separate company controlled by the National Provincial.

<sup>2</sup> E.g., Cox & Co., now absorbed in Lloyds Bank.

and exchange operations), with our Indian Empire and other Eastern countries.

**FOREIGN BANKS.**—The final class embraces a large and cosmopolitan group of foreign banks, the very existence of which is not only evidence of the financial supremacy of London and the consequent need for representation therein of most of the important banks in the world, but is also a striking consequence of the "open-door" policy adopted in this country in regard to the establishment of banks, as in other directions. As is natural, the foreign institutions transact business mainly with or on behalf of their own nationals, but they have also played an important and undoubtedly profitable part in developing the cosmopolitan features of London banking. Thus in pre-war days the bulk of London's exchange business with foreign centres was conducted by these institutions, which also discharged important functions in acting as representatives of their respective governments and as agents of their home industrial concerns for the raising of capital in the London Money Market and for other purposes.

### **Classification of Banks according to their Mode of Incorporation.**

Banks in this country may also be classified according to their mode of incorporation, although this aspect has necessarily become less important with the growing supremacy of the joint-stock institutions and the almost complete disappearance of the old-established private bankers.

First in order of historical importance must be placed the *banks established by royal charter*, among which are the Bank of England, the Bank of Ireland and the Bank of Scotland, together with certain colonial institutions such as the Chartered Bank of India, Australia and China. The powers and constitution of such banks are clearly defined by their charters, while the liability of each shareholder therein is limited to the amount unpaid in respect of his holding of capital.

The second class comprises the *joint-stock banks with limited liability* registered under the Companies Acts, 1908-1917. Most British banks, including, of course, the "Big Five", now belong to this group, and the limitation of the liability of the shareholders to the amount unpaid on their shares has resulted in the distribution of the capital of such concerns among shareholders of almost every section of the community.

As the extension to banking concerns of the joint-stock principle led to a remarkable concentration of the nation's financial resources in comparatively few hands, it is not surprising that the legislature should have deemed it necessary to provide for ample publicity regarding the affairs of the joint-stock institutions. Accordingly, under the provisions of the

Companies Act, each of these banks is required to make to the Registrar of Joint-Stock Companies an annual return (known as the *Annual List of Members and Summary*) showing the names, addresses and holdings of its shareholders, together with particulars of all places at which it transacts business and a statement in balance-sheet form of its capital, liabilities and assets, duly signed by its secretary or manager, and by at least three of its directors if there are more than three. Moreover, every limited banking company is required to exhibit a statement in balance sheet form at its head office and at each of its branches or agencies for the information of its customers and prospective customers.

The third class, comprising *private joint-stock banks with unlimited liability*, is now practically obsolete, and, in fact, only one representative—Glyn, Mills & Co.—remains as an independent institution at the time of writing. Another representative of this class—Coutts & Co., although still retaining its corporate existence, is now controlled by the National Provincial Bank.

Finally must be mentioned a heterogeneous class of banks, including those incorporated under dominion or foreign laws, and also such banks as the Isle of Man Banking Co., Ltd., incorporated in the Isle of Man, and the Guernsey Banking Co., Ltd., registered under the laws of Guernsey,—the latter now absorbed in the National Provincial Bank

This brief recapitulation indicates that the most important of our existing banks are formed as corporate bodies under the joint-stock companies Acts, in just the same way as the majority of trading and industrial concerns, and, as we have shown, this method of incorporation is of advantage both to the bank itself and to the public. The former benefits directly by the absence of the formalities and delays which accompany the incorporation or the alteration of the constitution and powers of an institution formed by Royal Charter, and also obtains the advantages of limited and reserved liability and of free transferability of its shares. Indirectly the bank benefits also from that wide publicity regarding its affairs which forms the public's strongest safeguard. The periodical publication of bank balance sheets constitutes the public's most certain protection against those weaknesses which characterised our earlier private banks; at the same time, such publicity encourages every banker to rely for the extension of his business and for the enhancement of his reputation largely upon the strength of his position as evidenced by his half-yearly figures.

### Branch and Independent Unit Banking Compared.

From the point of view of the banking student a most important and instructive comparison is that which is frequently made between the system of banking existent in this country

and that which exists in the United States. Whereas in this country the tendency has been for banking to become concentrated in the hands of a very small number of banks each having a large number of branches, in the United States the banking system, chiefly on account of Government restrictions, is preponderantly one of independent units<sup>1</sup> with a central banking system superimposed. Not unnaturally, considerable controversy has arisen as to which type of organisation can serve the community most efficiently, and it is interesting and useful to examine the main arguments which have been put forward on both sides.

Perhaps the most important argument adduced in favour of branch banking is that it permits the easy transfer of capital from regions which have a surplus to regions not so well endowed, and also that it enables funds to be distributed to different regions according to seasonal needs. The result is that interest rates tend to be equalised throughout the country, whereas, in the absence of branch banking, rates would tend to be low in old, well-developed districts, and high in the new, developing districts. Again, a branch bank can spread its risks over the whole range of industries, whereas an independent local bank must rely mainly on important local industries; indeed a bank of this kind may actually be organised and controlled by local borrowing interests. Hence it is claimed that branch banking tends to greater stability, for local "runs" and depressions can be more easily met than by independent unit banks with smaller average reserves. Lastly, the advocates of branch banking point to the efficiency of the services which it is able to provide. The advantages of first-class skill and business efficiency at headquarters can be given to all districts; internal and foreign exchange business can be handled economically, while adequate banking facilities can be provided in even the smallest village where no independent bank could survive.

Opponents of the branch banking system urge that some of the above advantages are not realised in practice, while others are equally available to independent unit banks. Furthermore, it is contended that there are many evils incident to branch banking from which independent unit banking is either wholly or comparatively free. The most important arguments, however, are directed, not against the organisation of branch banking, but against the dangers of monopoly, and there is considerable support for the view that the danger of a large proportion of the financial resources of the community becoming concentrated in a few hands is much greater under a continued process of amalgamation, such as exists in this country, than under an independent unit banking system, such as prevails in the United States.

<sup>1</sup> In the United States there are 28,468 National and State Banks, only 681 of which have branches.

Other arguments put forward point to the competitive waste of branch banking, to the high rates charged in well-established localities to cover low rates in developing regions, to the preferential treatment granted to concerns situated near head offices and to those whose principals are in direct personal touch with the bank directors and general managers, and to the fact that branch managers do not remain long enough at one branch to become thoroughly acquainted with local needs.

## CHAPTER 3

### THE BANKER'S FUNDS, THEIR SOURCE AND EMPLOYMENT

WE have seen that the success of a modern bank depends essentially upon the ability displayed by its management in employing to profitable advantage, and chiefly by lending to others, the vast sums left with the bank by its customers on current and deposit account. Now in the exercise of most of his principal functions—in accepting deposits on *current* account, in discounting bills and in granting loans, the banker incurs a liability to pay legal tender *on demand*, but in making advances and in discounting bills he acquires the right to demand repayment only *at some future time*. When, for example, money is lent to a trader for the purchase of goods or to a private individual for the purchase of a house, it obviously cannot be reclaimed without reasonable notice.

It is, therefore, of vital importance that the banker should not conduct his lending operations in such a way as to run even the slightest risk of being unable to meet any and every demand made upon him at a moment's notice. In fact, the world-wide reputation of British banking is based largely upon a rigid adherence to its bond to pay upon demand, and just as the Bank of England Note is regarded everywhere as being as "good as gold", so is a bill of exchange bearing the signature of a British bank, or a cheque drawn on a British bank by a respectable firm, accepted without hesitation wherever men trade, as being equivalent to cash.

But while this reputation of British banks is attributable in no small degree to their punctuality of payment, the remarkable success which has attended the organisation and growth of the large joint-stock banks is no doubt due primarily to their ability and judgment in deciding *how much* they can lend and *how best* they can lend. Strangely enough, modern joint-stock banking, with its intricate mechanism and vast resources, has been built up and is still based upon those old-established principles, discovered long years ago by the early goldsmith-bankers, that only a small proportion of the money left by depositors with a banker is demanded at any one time, and that, provided a *sufficient* reserve of legal tender is maintained for the satisfaction of all current and probable demands, the remainder of such money can be lent out at interest or invested in various forms of securities yielding a profitable return.

Clearly, the crucial test of successful banking is embodied in the questions—What is a *sufficient* reserve for the satisfaction of all demands? What is an adequate proportion of cash to the total amount of a bank's deposits? Different bankers would naturally answer such questions in different ways, but every banker is influenced by two distinct forces pulling in opposite directions. On the one hand, the necessity of maintaining an adequate reserve of legal tender constantly dictates caution; on the other hand, the desire to make profits for the bank shareholders is a strong inducement to lend freely. Moreover, a great deal must obviously depend upon the class of business conducted. For example, a bank operating chiefly in a rich residential suburb, where it may be assumed that payments are made largely by cheque and frequently to recipients in other areas, would require proportionately less cash in its tills than a bank in a busy seaside resort where money is being spent freely and cash is being constantly demanded by incoming visitors for pleasurable disbursements. Again, a joint-stock bank whose business lies largely in agricultural districts requires as a rule a lower proportion of cash than a bank which operates principally in busy industrial areas, for money is turned over much more quickly in the centres of great industrial activity.

There are also other factors which influence the proportion of cash held by a banker in readiness to meet the demands of his customers. For example, it is well known that the amount of a banker's reserve varies considerably with the state of public confidence and with the general conditions of trade. In times of depression and business uncertainty, when confidence is at a low ebb and people lack faith in the future, greater cash reserves are maintained by the banks than in prosperous times when faith runs high and future prospects appear to be bright, when trade shows promise and when many customers, intent upon "making hay while the sun shines", apply to the banker for accommodation to finance new business ventures or to extend their existing operations.

But whatever the conditions of trade or the circumstances of the banker's business, a sufficient reserve of legal tender must be maintained to meet all current and probable demands, normal and abnormal, otherwise the bank's reputation for solvency might be injured and its stability impaired by even momentary hesitation in meeting its obligations. Happily, such dangers are fully recognised by our leading bankers, who aim not only at maintaining adequate reserves of cash, but also at distributing the remainder of their assets in such a way as to provide what we may term second and third "lines of defence", additional to the first line of defence which is, of course, represented by their holdings of coin and legal tender notes.

## The Balance Sheet of an English Joint-Stock Bank.

We can best illustrate the statements in the foregoing paragraphs by a careful analysis of the items in the balance-sheet of one of our large joint-stock banks, of which the following is a typical specimen :—

### NATIONAL PROVINCIAL BANK, LIMITED

BALANCE-SHEET, DECEMBER 31, 1925

Liabilities.	Assets.
Capital :—	Coin, Notes and Balances with the Bank of England . . . . .
Registered, £80,000,000; sub-	Balances with, and cheques in
scribed, £43,617,080.	course of collection on other
Paid up :—	banks in the United Kingdom
120,000 shares of £25 each,	and Ireland . . . . .
£2, 10s. paid . . . . .	Money at call and short notice . . . . .
1,972,354 shares of £20 each, £4	Bills discounted—(1) Payable by
paid . . . . .	British firms and institutions
234,000 shares of £5 each, fully	in the United Kingdom, and
paid . . . . .	Treasury bills, £33,762,114, 0s. 9d.;
Reserve fund . . . . .	(2) other bills, £2,118,802, 15s. . . . .
Current, deposit and other accounts	Investments—British Government
Liabilities for acceptances, endorse-	securities, £31,338,358, 19s. (of
ments, etc., as <i>per contra</i> . . . . .	these £209,639, 17s. 6d. is lodged
	for public accounts); Indian and
	Colonial Government securities;
	debenture, guaranteed and pre-
	ference stocks of British and
	Indian railways, British corpora-
	tion and water works stocks,
	£8,116,864, 10s. 3d.; canal, dock,
	river conservancy and other in-
	vestments, £1,508,779, 3s. 6d. . . . .
	Investments in affiliated banks . . . . .
	Advances to customers and other
	accounts . . . . .
	Bank premises . . . . .
	Liabilities of customers for accept-
	ances, endorsements, etc., as <i>per</i>
	<i>contra</i> . . . . .
<u>£362,638,760</u>	<u>£362,638,760</u>

For the guidance of the uninitiated it should be explained that a balance-sheet is a statement in recognised form showing on the one side the value, at any given date, of the *assets*, i.e., the things possessed by or owing to a business, and, on the other side, the value at the same date of the *liabilities* of that business, i.e., the things owing by the business to others, including the amount of capital and reserves (if any) owing by the business to its shareholders.

A balance-sheet may be drawn up at any time, but although the majority of commercial concerns issue such statements only *once* in every year, the law prescribes that all limited joint-stock banks shall draw up a balance-sheet *twice* in every year, and that they shall exhibit a copy at the Head Office and every branch, and file a duly audited and authenticated copy with the Registrar of Companies on the First Monday in February and the First Tuesday in August. Such a provision is clearly of the greatest



importance and utility to all connected with a joint-stock bank, as it ensures not only a careful and punctual preparation of its figures, but also that any reputable bank will aim at placing before the public a statement which can be challenged neither on its merits as a model of clearness and correctness, nor by reason of its disclosure of any weakness in the financial position of the institution concerned.

### The Liabilities of a Banker.

In analysing the balance-sheet reproduced above, we will consider first the items on the left or liabilities side, for this side is not only the less imposing and therefore the more easily understood, but may also be regarded as the side from which the business of the banker originates, inasmuch as the items on this side represent the sums received by the banker for employment in his essential business as a lender of capital.

**CAPITAL PAID UP.**—This item represents the amount invested in the bank by its shareholders,—the sum actually paid up in cash by the proprietors of the concern to enable it to originate and conduct its business. In banking, as in any other business, the *first* step necessary before operations can be commenced is the accumulating or raising of the requisite capital, and although the investors or shareholders, by providing the capital, are in the nature of creditors of the business, the amounts owing to them cannot be paid in the event of liquidation until *last*, i.e., when all other claims against the concern have been satisfied.

It may be added that the words "paid up" are of vital significance, for they distinguish only one of the various ways in which the capital of a joint-stock bank may be described. Thus the *Authorised*, or *Nominal*, or *Registered* capital is the *total* amount of capital which the bank has power to issue (£60,000,000 in the balance-sheet given), and is to be distinguished from the *Issued* capital, i.e., the amount actually offered for public subscription, and from the *Subscribed* capital, which is that sum applied for by the public and allotted by the directors of the company to sundry applicants, who thereafter become shareholders in the concern. Moreover, it is not unusual for only a part of the subscribed capital to be "called up". Thus, for each £10 share taken up, the original shareholders may be asked to pay the bank only £3 in cash, in which case the "*Paid up*" capital would represent only three-tenths of the subscribed capital. The remaining seven-tenths is described as "*Uncalled* capital", and this may be further subdivided into (a) "*Callable* capital", i.e., a proportion (for example three-tenths) which the directors may call at any time they deem fit, subject to any conditions in the Company's Articles of Association, and (b) "*Reserve* capital", i.e., the remaining balance of four-tenths which may be called up by the directors only in the event

of the liquidation of the bank. It has already been observed that most English joint-stock banks have established such a Reserve capital, and by so doing have materially strengthened the security available to the bank's depositors. (See *ante*, page 9.)

**RESERVE FUND.**—This must be carefully distinguished from the Reserve capital described in the preceding paragraph, for whereas the latter is a contingent security available only in the event of liquidation, the Reserve fund is actually an accumulation of sums allocated from the bank's profits and invested from time to time in first-class securities. The Reserve Fund is, of course, available to be drawn upon at any time in the event of the bank incurring heavy unexpected losses, and although it thus provides an additional safeguard for the bank's customers, it nevertheless belongs to the shareholders or proprietors of the bank and is sometimes drawn upon for their benefit in order to issue to them shares on bonus terms or to equalise the dividends paid as between one year and another. This fund may, in fact, be regarded as a surplus gradually built up by careful management and representing the excess of the value of the bank's assets over its total liabilities, including its liability to its shareholders for capital paid up and for undivided profits.

**CURRENT, DEPOSIT, AND OTHER ACCOUNTS.**—In the balance-sheet under consideration, as indeed in any other bank balance-sheet, this item is by far the largest. It represents the total sum borrowed by the bank from its many customers on current and deposit accounts, the latter bearing interest and being subject to an agreed notice of withdrawal, but the former earning no interest and being repayable in legal tender upon demand. In addition, it includes as "Other Accounts" any other *credit* balances in the bank's ledgers, such as the balances of its Profit and Loss Account, Unclaimed Dividend Account and Unclaimed Interest Account, together with any hidden "Reserve Accounts" which the bank may choose to maintain for its own purposes. It is clearly a task of some magnitude to provide safe and yet profitable employment for so large an amount of money. The other side of the balance-sheet will demonstrate how this is done in the case of the bank concerned and of other similar institutions.

**LIABILITIES FOR ACCEPTANCES, ETC.**—The total under this heading represents the liability of the bank in respect of bills of exchange which it has accepted or endorsed for the accommodation of its customers. As, however, the latter are liable to recoup the bank for any loss it may suffer by thus lending its name, the amount is "offset" by a corresponding item on the other side of the balance-sheet.

### The Assets of a Banker.

The assets side of the balance-sheet indicates how the bank employs the sums entrusted to its keeping by its customers and

shareholders. As we have shown, successful banking depends very largely on the ability of the management in apportioning the bank's funds among the various items described as its assets, and particularly in determining what proportion of the total funds must be held in the form of *liquid assets*, i.e., cash or assets readily convertible into cash, and what proportion may safely be more or less "tied up" in first-class investments and in loans to customers.

Before considering the items individually, we may note that in a bank balance-sheet the assets are always arranged in order of *liquidity* or realisability, so that customers and others interested in the concern can estimate its strength and stability almost at a glance by observing the proportion of liquid assets maintained by the management. Thus "Cash" always appears first, while the item "Bank Premises", representing assets which are least readily convertible into money, usually figures last.

COIN, BANK NOTES, ETC.—It will be remembered that the bank's undertaking is to meet most of its liabilities *in legal tender* on demand, and accordingly every bank maintains at its head office and at each branch a sufficient reserve of legal tender to meet all probable demands. These cash holdings are the bank's "first line of defence", and with them, as a rule, is lumped the bank's "Balance at the Bank of England", which is generally regarded as equivalent to cash. Until recent years the amount shown in the second item as "Balances with Other Banks, etc.", was also so regarded and was generally included in one sum with the cash holdings. The present practice is clearly an improvement, although there is probably no doubt as to the complete and instant realisability of the sum shown under this heading.

The item "Balance at the Bank of England" will be referred to more fully at a later stage, but it may be observed that it is one which is to be found in the balance-sheets of all joint-stock banks, for these, as already indicated, have long been accustomed to leave their surplus funds on deposit with the central institution. This practice, which has resulted in the establishment of the Central Reserve System, is attended by a number of advantages, not the least of which is that it enables large transfers of funds between the banks, and particularly the heavy daily settlements arising from the "Clearing System", to be effected with the minimum of trouble and delay.

MONEY AT CALL AND SHORT NOTICE.—The keeping of an adequate cash reserve is, of course, as necessary to a banker's daily business as it is to the maintenance of his stability. But the reader will appreciate at once that cash kept in a safe or on current account with another bank earns nothing, and as a bank is established primarily to earn profits for its shareholders, bankers naturally sought some method of loaning which, while it ensured that the funds would be readily available if required, provided at least some profitable return on the money employed.

Happily, such an outlet was found in that intricate but remarkably efficient organisation known as the London Money Market, where numerous bill brokers, discount houses and stock exchange operators are ready at all times (although more so at some times than at others) to borrow large sums of money, for short periods at a low rate of interest

Much of this money is lent out "*at call*", i.e., subject to repayment upon demand, or "*at short notice*"—from six to ten days—in which case the loans are referred to as *fixtures* or *weekly money*.

Other sums, described as "*Day to Day Money*", are left with the market operators subject to the banker's right to demand their return at a day's notice, while at times the broker is called upon to borrow "*over-night*", i.e., from midday on one day to midday on the next. Such arrangements are clearly of the greatest utility to the banks, for they not only enable a bank to employ a large proportion of its funds conveniently and profitably, but also to ensure that the "second line of defence" shall be immediately available in the case of emergency.

It may be added that the loans are secured by the deposit with the bank of first-class bills or other securities, although each bank tends to deal only with certain brokers whose reputation and stability are beyond question. The funds are employed by the bill brokers in discounting bills of exchange and by the stock exchange operators in dealings on the stock exchange, and if, as sometimes happens, the loans are "called" by the bank, the dealers find themselves compelled to borrow from other banks or from the Bank of England. In the latter event, the market is said to be "in the Bank".

**BILLS DISCOUNTED.**—A bank's "third line of defence" consists of the bills of exchange which it has discounted for customers or which it has itself purchased in the open market. It should be explained that "discounting a bill" simply means purchasing the bill at its face value (i.e., the sum for which it is drawn) *less* the amount of interest on the bill for the time to elapse before it falls due for payment. Thus a bill for £100 which is not payable until the expiration of three months would be worth £99 to the banker if interest is reckoned at 4 per cent. per annum (i.e.,

$$£100 \text{ less } 100 \times \frac{3}{12} \times \frac{4}{100}.$$

In pre-war days the greater part of the total under this heading represented ordinary trade or commercial bills drawn on British firms and purchased by the bank from customers (including bill brokers) who required immediate funds and could not wait until the bills fell due for payment. A further proportion was and is represented by "bank bills", i.e., bills drawn, accepted or endorsed by reputable banks in this country, while a considerably smaller amount (included no doubt as "other

bills" in the above balance-sheet) represents discounts of bills on firms and banks in other countries. Apart from such items, however, the total of Bills Discounted in the balance-sheets of English banks always includes a considerable sum which has been invested by the bank in British Government Treasury Bills, i.e., promises by the Treasury to repay stated sums at the expiration of a given period, usually three or six months. During and since the Great War the amount so invested by each bank has increased considerably, and there is little doubt that in the case of most banks the holding of treasury bills is now greater than the holding of bank and trade bills.

First-class bills of exchange are frequently described as an ideal form of investment for a banker's surplus funds. The accuracy of such a statement is apparent when it is remembered that bills are payable *in full* at the expiration of comparatively short periods, and, provided the financial stability of the parties responsible for payment is undoubted, the banker is reasonably sure of an automatic return of his cash as the bills fall due. Furthermore, although bills are not immediately realisable assets in that their date of maturity cannot be hastened, first-class bills can always be rediscounted if funds are urgently required, while the fact that they can be obtained for varying sums, large and small, and for varying periods before they fall due, enables the banker to choose such bills as will suit him best. Thus he can without difficulty increase his cash reserves by the simple expedient of rediscounting a portion of such bills as he already holds, or of refraining from discounting further bills from time to time, as his holdings fall due for payment. Finally, he can so arrange his investments in bills that they mature and increase his cash balance at those times when he most requires additional funds, as for example, at the turn of the quarter when he has heavy dividends to pay on behalf of his customers.

**INVESTMENTS.**—The foregoing items of the balance-sheet comprise the banker's *liquid assets*. Those which remain represent the more permanent means of employing the funds at his disposal, and accordingly include those items upon which it would be dangerous to rely in times of emergency for money wherewith to meet the urgent demands of his customers for repayment of their deposits.

First among these items is that of "Investments", which include the bank's investments in British and Colonial Government securities, in British municipal and railway stocks and loans, and in affiliated banks, i.e., smaller banks which are intimately associated with the larger concern and in which it holds a large part of the capital. It will be observed that a portion of the total is described as "lodged for public accounts". This means that, in accordance with law, investments to the amount indicated are registered in the names of joint trustees (including representatives of the bank), and are specially held (or "ear-

marked") as security for the due repayment of public funds which are lodged with the bank on the deposit and current accounts of government departments and local authorities.

While Investments are correctly regarded as a bank's fourth line of defence, they are characterised by the fact that they are difficult to realise and turn into cash in emergency, for it is just at those periods when cash is most urgently needed that securities are unsaleable or saleable only at considerable loss. If, during a period of emergency, all the big banks endeavoured to realise their investments, there would be a heavy fall in security prices which would be accentuated by other sales of investments by stock exchange operators who were unable to renew their loans. Furthermore, the selling of large amounts of securities by a large bank would not only be dangerous as giving rise to suspicions of weakness, but would also serve to intensify any lack of confidence which might exist. On the other hand, there is little doubt that our large joint-stock banks show the totals of such investments at considerably below their real worth, and by so doing create what is in fact a secret reserve.

**ADVANCES TO CUSTOMERS.**—Included in the total under this heading are the loans made by the banker to his customers as fluctuating overdrafts on current account, and as fixed loans on loan account. The majority of such loans are payable on demand or at short notice, but to anyone at all acquainted with a banker's business, it will be clear that only a small proportion of the large total under this heading can be turned into cash at a moment's notice or even within a reasonable period. The trader who has borrowed from the bank in order to purchase additional stocks, or a private individual who has obtained an advance in order to buy a house, cannot be expected to repay the debt upon demand. Indeed, it would be difficult enough for such customers to wipe off their indebtedness even within the period of notice which is usually allowed in such cases. At all events, it is certain that no bank of repute can rely for funds in an emergency on a wholesale demand to its customers to repay their loans. Thus it follows that while a bank may expect in an emergency to have to meet considerable demands by its depositors, it cannot look for the necessary funds to its loan account customers, for its action in demanding such repayment could have only one effect—that of still further intensifying panic and of destroying public confidence.

**BANK PREMISES.**—The premises of a bank constitute its most unrealisable assets, for, apart from the fact that the large offices in which modern bank organisations are housed could only with difficulty be converted to other uses, it is obvious that assets of this character can at best be realised very slowly. Nevertheless, it is a well recognised fact that the value of the item Bank Premises as stated in the balance-sheets of our banks is far below its true worth, in substantiation of which we cannot do better

than refer to the oft-quoted fact that the value of the premises of the Bank of England does not appear in its balance-sheet at all, although the item must amount to several millions sterling.

**LIABILITIES OF CUSTOMERS FOR ACCEPTANCES, ETC.**—As has already been explained, this last item is in the nature of a contra entry to the similar item which appears on the other side of the balance-sheet, and indicates that although the Bank has assumed liability in respect of its signature on bills to the amount stated, it nevertheless is secured to an equivalent extent by the signatures of its customers on the same bills.

### Other Items which Sometimes Appear in Bank Balance Sheets.

In addition to the items explained in the foregoing paragraphs, bank balance-sheets sometimes include other entries. For example, the item "Notes issued" or "Notes in Circulation" sometimes appears on the liabilities side, although it is now obsolete in the case of all London clearing banks except the Bank of England, the Westminster Bank, with a small note issue in the Isle of Man, and the National Bank, whose notes circulate in Ireland. When it does appear the entry represents, of course, the amount of notes issued by the bank which are in the hands of the public or held by other banks.

**REBATE ON BILLS NOT DUE.**—In view of the large sums invested by modern banks in the discounting of bills, there is usually a considerable proportion of the discount on such bills unearned by the bank at the time its half-yearly balance-sheets are made up. It will be remembered that the discount on a bill is the interest on its face value for the period between the date of discounting and the date of maturity, and as some of the bills held by a banker are bound to mature after the date of his balance-sheet, he rightly considers that part of the discount is to be regarded as earned in the subsequent financial period. Accordingly he adjusts his profits by opening an account in his books headed "Rebate on Bills not Due", to which he *credits* the total amount of discount which he calculates to be unearned at the date of the balance-sheet, including the total in the balance-sheet under the heading "Rebate on Bills not Due" on the liabilities side.

**BALANCE OF PROFIT AND LOSS ACCOUNT.**—The balance of a bank's Profit and Loss Account is not always included in the general total of its current and deposit accounts, but is sometimes shown in the balance-sheet as a separate item on the liabilities side. The balance, of course, belongs to the shareholders of the bank and represents the amount of undistributed profit after payment of the dividend and after providing for depreciation and allocations to reserves and other funds.

### **The Test of a Bank's Strength.**

As a general statement it is no doubt true to say that the balance-sheet of an ordinary commercial concern is of no great importance except to its shareholders and officials, and possibly also to a few trade rivals. The case of a great joint-stock bank is, however, vastly different. Not only are its balance-sheet figures of interest and importance to its numerous shareholders and officials, but they are also of vital significance to the multitudes of depositors who have entrusted their savings to its keeping, and further, to the body of potential customers of the bank represented by the public in any places wherein its business is conducted. The published balance-sheet is necessarily the best means by which an outsider can judge the soundness and stability of the bank's organisation, but it is clear that the figures in themselves can convey little information which is useful, unless those perusing the items are able to form some estimation of their significance and true relation to one another.

### **The Proportion of Cash Held.**

The questions therefore arise, "How is the strength of a bank to be judged"? "What is the true test of a bank's soundness and stability"? In the preceding paragraphs we have frequently referred to the importance of the proportion of cash maintained by a bank, and undoubtedly the crucial test of a bank's financial strength and stability is the proportion of its cash holdings to its liabilities to the public. There are, however, a number of different ways of calculating this relation. One method is to take the total of the balance-sheet as 100, and to work out the amount of cash as a percentage of that total. This is, of course, tantamount to determining what proportion of a bank's total assets is represented by cash, and it is in fact frequently employed in comparative statements drawn up to indicate the distribution of the assets and liabilities of banks in this country. For example the figures on page 37 show this average distribution in the case of ten English Clearing Banks for the month of February, 1926.

Another method is to calculate the proportion between the bank's cash and its total liabilities in respect of current and deposit accounts, acceptances, capital, and reserve funds. The third method, and one which has much to recommend it, is to take the proportion of the bank's cash to the amount of its liabilities on Current, Deposit, and Other Accounts; in other words, to compare the banker's first line of defence directly with the source from which spring his most frequent and urgent demands for repayment.

As has been indicated, the actual proportion of cash maintained by banks in this country varies considerably as between the different banks and also from year to year. Much depends on



the nature of the business and on the general state of security and trade. Banks which have considerable sums left with them on deposit at notice can safely carry smaller reserves than those

AVERAGE BALANCE-SHEET FIGURES OF  
TEN LONDON CLEARING BANKS FOR FEBRUARY 1926

ASSETS.	Million £s.	Approximate %.
Coin, Notes and Balances with the Bank of England . . . . .	190.8	10.2
Balances with and Cheques on other Banks in U.K. . . . .	48.3	2.5
Money at Call and Short Notice . . . . .	114.5	6.1
Bills Discounted . . . . .	212.4	11.3
Investments, including Investments in Affiliated Banks . . . . .	295.6	15.8
Advances to Customers and other Accounts . . . . .	879.8	46.9
Liabilities of Customers for Acceptances, Endorsements, etc., as <i>per contra</i> . . . . .	105.7	5.6
Bank Premises Account . . . . .	30.3	1.6
	<u>1877.4</u>	<u>100.0</u>
<b>Ratio of Cash to Current, Deposit and other Accounts . . . . .</b>		<b>11.5 %</b>
LIABILITIES.	Million £s.	Approximate %.
Capital Paid up . . . . .	68.8	3.6
Reserve Fund . . . . .	56.3	3.0
Current, Deposit and other Accounts . . . . .	1643.5	87.6
Acceptances, Endorsements, etc. . . . .	105.7	5.6
Notes in Circulation <sup>1</sup> . . . . .	3.1	0.2
	<u>1877.4</u>	<u>100.0</u>

<sup>1</sup> National Bank (Ireland) only.

which have a greater proportion of money on current account, or on deposit subject to withdrawal on demand. Again, banks which are essentially deposit or savings banks must maintain a higher percentage of cash than banks such as the agricultural and credit banks of the Continent, which are formed and capitalised specially for the purpose of granting loans against land and providing capital for industrial undertakings. So far as the large joint-stock banks in this country are concerned, the proportion of cash to deposits during recent years has averaged about 11-12 per cent., and "anything from 10 per cent. upwards may be regarded as sufficient for practical purposes".<sup>2</sup> It will be noted that the ratio for February 1926, as given by the above table, is 11.5 per cent.

As we have previously stated, the strength of English banks is materially enhanced by the convenience and proved efficiency of the system of lending "money at call" on the London Money Market. It will be seen from a perusal of the above figures that the total of the funds so utilised approximates to 6 per cent. of the total assets and to as much as 60 per cent. of the amount retained as cash in the hands of the banks and the Bank of England.

<sup>2</sup> F. E. Steele, *The Banker as a Lender*.

### The Proportion of Advances to Liabilities.

The second factor of importance in estimating the strength of a bank is the relation between the total of its loans and advances, plus its discounts, to its liabilities on current and deposit account, or alternatively, the proportion of the amount of its loans and advances, including discounts, to the total of the bank's assets. The object of such an estimation is to determine whether the bank is maintaining a sufficiently liquid position, or whether it must be regarded as "overlending", i.e. locking up too great a proportion of its funds in loans of a more or less fixed character.

It is difficult to lay down any hard and fast rules, but it appears to be an established principle among British banks that advances, including bills discounted, should not be greatly in excess of 50 per cent. of the total liabilities on deposit and current accounts. In the table on page 37 this proportion appears as 46·9+11·3 per cent., viz., 58·2 per cent.

### The Quality of a Bank's Loans and Investments.

Apart altogether from the relative proportion of the various items in a bank's balance-sheet, the question of the *quality of a bank's loans and investments* is clearly one of vital importance, although it cannot, of course, be answered by any consideration of the figures disclosed by the average balance-sheet. The strength of any institution as indicated by its balance-sheet would obviously be merely ephemeral if its investments were largely of a speculative character, or if its loans were made without adequate security. Moreover, it is clearly more advantageous if a bank's loans are well distributed both in amount and in area, than if they are made in large amounts to a comparatively small number of customers or are confined mainly to a particular area or industry, either of which may be subject to widespread disaster. Considerations of this kind are scarcely applicable to the large English banks, but they serve to show that ordinary members of the public who rely solely on the figures included in a bank's balance-sheet, have no safeguard in these respects other than the assurance of the auditors that adequate provision has been made for bad and doubtful debts and similar sources of loss.

On the other hand, the remarkable development in this country of the system of branch banks as compared, for example, with the "independent unit" banking system which exists in the United States (see *ante*, page 23) has ensured an unequalled degree of security and stability in our banking organisation, while the centralisation at the Head Offices of the large joint-stock banks of a highly efficient management enables the local offices to benefit from first-class banking skill, and ensures that the banking system generally shall be conducted in the best interests of the nation as a whole.

Partly on account of this unusual development of the branch system, but mainly as a result of deliberate policy, our large banks do not lock up their resources to any great extent in any one industry. Their risks are well spread over a wide field, while the capital which they supply is lent for relatively *short periods*, i.e., English banks supply *commercial* rather than *investment* capital. Thus, if a manufacturer applied to a bank for a loan of £30,000 for the purpose of erecting a factory and installing machinery and plant, the request would probably be refused. Capital of this nature is usually obtained in this country from investors who are willing to lock up their capital for long periods. But if the same manufacturer applied to the bank for a temporary overdraft to pay for raw materials, i.e., to finance production during the stages between production and final consumption, accommodation would probably be granted if satisfactory security were forthcoming.

This feature of English banking is one which distinguishes it from banking in many other countries, particularly in Germany and Italy, where the banks supply investment capital for long periods and are frequently closely associated and interested through their boards of directors with the fortunes of particular industries.

Both types of banking have their supporters, and in 1917, on the recommendation of the Faringdon Committee appointed to consider the question, the British Trade Corporation (now part of the Anglo-International Bank) was established in this country to fill the gap which existed in our financial organisation for supplying long-period advances for industrial development.

### The Creation of Credit.

Our analysis of the balance-sheet of an average joint-stock bank and our consideration of the functions of modern banking in this country, have shown that but a small proportion of a banker's total liabilities need be secured by legal tender currency stored in its vaults and strong rooms. Modern banking is built up and has developed upon the assumption that a banker can *give credit* considerably in excess of the total of cash which is actually left with him. If, for example, £3000 in cash is left with a banker by a depositor or by several depositors, the banker proceeds at once to loan or to invest about £2000 of this amount, for he knows by experience that for all practical purposes it is safe for him to retain in cash about £1000, or approximately one-third of the funds left in his keeping. But bankers at the present time go even further than this. Thus, if £1000 in legal tender is left with a bank by a customer, the banker may add that amount to his cash reserve and proceed to create credit to perhaps twice this amount. He may do this by granting overdrafts to his customers, or by discounting more bills, or by

investing in first-class stock exchange securities. In any case the proceeds of the credit which the banker creates must ultimately be paid to somebody, and they go to swell either his own deposits or those of other bankers. Hence if we could imagine a combined balance-sheet for all the banks we should find the position somewhat as follows :

### Combined Balance Sheet—Joint-Stock Banks.

(a) Upon receipt of £1,000 in cash.

LIABILITIES.		ASSETS.	
Deposit . . .	£1,000	Cash . . . . .	£1,000

(b) After creation of Credit.

LIABILITIES.		ASSETS.	
Deposits . . . .	£3,000	Cash . . . . .	£1,000
		Loans . . . . .	2,000
	£3,000		£3,000

This power of creating credit is necessarily limited by each banker's opinion as to what constitutes an adequate ratio of liquid reserves to his liabilities, but if the advances are made against good security and are reasonably distributed there is not much danger, the banker being thoroughly secure in his knowledge that only a small proportion of the money left with him will be demanded at any one time. But the outstanding fact about modern banking in this country is that the reserve which each bank considers it necessary to maintain, is not all retained by the banker himself in legal tender currency; in actual fact, as we have seen by our analysis of the balance-sheet on page 28, he entrusts part of his reserve to a central bank (the Bank of England) *which carries on an ordinary banking business, and itself utilises any legal tender left with it as a basis for creating credit.* The first banker regards his credit balance at the Bank of England as being as good as cash; he relies on obtaining legal tender to *the full amount of his balance* whenever he wants it, and in spite of the fact that the central bank makes no more provision for the bank in this respect than it does for any of its other customers.

Thus we are brought face to face with one of the most striking facts which the student of banking has to understand; the original £1000 in legal tender left with the bank may not only form the basis for the granting of, say, £3000 in credit at the first bank, but it may also lead to the creation of a further £2000 in credit at the central bank, the actual amount depending, of course, upon the proportion of liabilities to assets which the central bank seeks to maintain.

It will be noticed that we have used the term "legal tender"

throughout the foregoing paragraphs. Before the Great War this was gold, or Bank of England notes which represented gold. At the present time, however, the bulk of the legal tender currency of this country consists of treasury notes which are secured by a comparatively small reserve of gold. Treasury notes are really only a promise by the government to repay gold, and in times of emergency may be issued to an amount far in excess of all the available gold in the country. The reader has only to pause for a short time to consider these facts in order to realise the vast superstructure of credit which by the modern system of banking in this country, has been built up upon a small reserve of gold. The branches of the great joint-stock banks create credit and look to their head office to supply them from time to time with any legal tender currency which they may require. The head offices in turn look to the Bank of England, which conducts an ordinary banking business and makes no pretence of keeping the reserves of the joint-stock banks in cash or legal tender currency. Thus we find that but a tithe of the vast liabilities of our great banks is covered by actual gold, and herein lies not only one of the wonders of the modern commercial world but also one of the greatest causes of danger in the intricate and delicate credit machine.

### The Limits to a Banker's Power to Create Credit.

It must, however, be clearly understood that there are very definite limits to the power of the banks to create credit in the manner described above. These are the limits set by their power to obtain *additional* cash. The banks maintain a certain ratio of cash to liabilities; hence, if stability is to be preserved, liabilities cannot be expanded without an increase in cash. It follows that the *ultimate* controller of credit is the authority which regulates the banks' holdings of cash. From 1914 to 1925 the authority mainly responsible for monetary policy in this country was the Government itself, which, until 1920, created the basis of a huge expansion of credit by increasing the issue of treasury notes. Since the adoption in 1920 of the "Cunliffe limit" to the issue of treasury notes, the Government has pursued a policy of gradual deflation which has involved not only a reduction in bank cash (i.e., legal tender currency) but a corresponding contraction in bank credit.

Happily we are to-day back on an effective gold standard, with the result that the ultimate control of credit policy is once more in the hands of the Bank of England, which exercises that control through its policy of lowering or raising its discount rate. We may go a step further and state that the final controller of credit is gold itself, for so long as an effective gold standard is maintained, future credit expansion or contraction will be conditioned by the inflow and outflow of gold.

But while a gold standard imposes in this way an automatic check on the undue expansion of credit, it is a *long-period* check, and the influence on credit which bankers may exercise, although limited, is important. Thus, it is generally recognised that banking policy (as distinct from Bank of England policy) has an important bearing on the cyclical fluctuations of trade which have occurred with such uncanny regularity during the last century.

Although the credit aspect is only one aspect of the trade cycle, and probably not the most important, there seems to be no doubt that by their action in granting accommodation too freely when trade is active, and restricting advances too severely when trade is languishing, bankers play an important part in determining the height to which a boom can rise and the depth to which a depression can fall.

### The Sources of a Bank's Profits.

We have seen in the preceding pages that the primary aim of the great joint-stock banks and of the Bank of England, as of all competitive industry, is the making of profits. Banks exist first and foremost to earn dividends for their shareholders and to make those dividends as large and as regular as is possible and compatible with the maintenance of a sound and prosperous institution.

The sources of a banker's income are numerous. First in order of importance is the amount received as interest on loans, overdrafts, and money lent out at call or short notice on the Money Market, together with the current account charges for "commission on turn-over" and "postages". In a similar category is the sum received by the banker as discount and commission charges on bills of exchange, the total of this item being taken to the half-yearly profit and loss account only when careful allowance has been made in respect of rebate on bills which are not then due for payment.

The third important source of income consists in interest on the banker's investments in stocks and shares, a fairly stable item which can be calculated in advance within reasonable limits. Lastly, there are commissions earned by the bank for the variety of services which it renders to customers and other banks, including commissions on stock exchange transactions, on promotion operations in connection with the flotation of new joint-stock companies, and on foreign exchange business transacted for its customers. To this last item must, of course, be added the profits made from time to time by its exchange dealers in their daily operations with foreign countries.

But the banker's business is not all profit, as so many people seem to think. As in any other business, there are heavy charges and expenses to be met and inevitable losses of various kinds to

be provided for, quite apart from the occasional severe losses which even the best-regulated institution has to meet from time to time. The chief item of expenditure is necessarily the sum paid to customers in respect of interest on deposits, and to this major expense must be added similar items of a heterogeneous character such as salaries, pensions and directors' fees, rent, rates, taxes and insurance of premises, postages and stationery, travelling expenses and repairs to premises. In addition to these necessary outgoings the bank must make adequate provision to meet such ordinary trading losses as depreciation of premises, leases and securities, while the nature of a banker's business renders him liable to severe loss from bad debts, theft, mistakes of his staff involving monetary liability, and from adverse legal decisions which may give rise to heavy costs.

Happily, the business of banking in this country is conducted on such efficient and sound lines that the shares in our joint-stock banks are regarded as being among the safest, steadiest and most profitable of stock exchange investments, in proof of which we need not look further than the fact that such shares are largely held by investors of quite moderate means.

## CHAPTER 4

### THE BANKERS' BANK

No study of British banking practice and law could be complete without some more or less detailed consideration of the constitution and functions of the Bank of England. Not only does this institution stand pre-eminent among the world's banking organisations, but it is the bank of all the bankers in Britain and performs such important functions in the London Money Market and in connection with London's position as the world's chief monetary centre, that it may well be described as the hub of international banking and finance.

#### The Origin of the Bank of England.

It is frequently stated that modern English banking originated with the foundation of the Bank of England in 1694, but as we have seen, the formation of the Bank was due rather to the financial difficulties of the Government of the day than to any urgent desire to provide additional banking facilities for the nation's developing trade and industry. Nevertheless, the unique strength of the new Bank, and its importance as the bank of the State, soon brought profitable business to its doors, and its position was specially secured when, in the fifty years following its foundation, the Acts of Parliament passed every ten years to renew its original charter strengthened its monopoly of joint-stock banking in London and the surrounding district.

Thus the Act of 1708 forbade the issue of bank notes by any partnership or corporation other than the Bank itself consisting of more than six persons. This restriction remained operative for more than a hundred years, but by the end of the eighteenth century the financial strain of the Napoleonic Wars had led to a constant succession of banking failures and to widespread financial difficulty owing to the depreciation of the bank note currency and of the foreign exchanges. Indeed, in 1797 the Bank of England Reserve had become so seriously depleted that an Order in Council had to be issued permitting the Bank to suspend payments in cash. This restriction of cash payments continued until 1819, and, as a result, gold coins disappeared from circulation, the price of gold rose very considerably, and the foreign exchanges became markedly unfavourable to this country.

When at length peace was declared with Napoleon in 1813, a period of violent speculation ensued, being followed as is usual



by a period of reaction and widespread disaster, during which hundreds of small local note-issuing banks failed. Inevitably, public attention was directed to the condition of the currency and banking systems, the unsatisfactory position of which was attributed in many quarters to the monopolistic privileges of the Bank of England.

This view is expressed very forcibly by Macleod,<sup>1</sup> who writes : " The effects of this monopoly, however, were most disastrous. Bank of England notes had no circulation beyond London, and it would not establish any branches in the country. No other powerful and wealthy banks could be formed, the consequence was, that when enterprise awoke in the country, in the last quarter of the last century, and there was a great demand for an increased Currency, all sorts of petty tradesmen in all directions, grocers, linen-drappers, cheesemongers, tailors, etc., started up and turned ' bankers ', i.e., issuers of promissory notes, so much so, that, in 1793, there were about 400 of these country ' bankers '."

In 1822, however, a Mr Joplin, a student of banking, published a pamphlet which showed quite clearly that there was nothing in the Bank of England's Charter to prevent the formation of companies for any banking business other than the issue of notes. In effect, Joplin discovered a flaw in the Bank's monopoly, for he showed that a bank which traded only in capital (in reality the most important function of banking) would not trench upon that monopoly, nor in any way infringe the Bank's Charter.

The result of the discovery of this loophole in the law was that in subsequent years, in spite of the strenuous opposition of the Bank of England, a number of Acts were passed which mitigated the effects of its monopoly, and enabled other banks to be set up sufficiently strong to compete with the central institution. Thus the Act of 1826, to which we have already referred, permitted the establishment of joint-stock banks of issue with unlimited liability provided that they did not conduct business within 65 miles of London, while the epoch-making Bank Act of 1833 sanctioned the establishment in London itself of joint-stock banks for the transaction of all banking business other than the issue of notes to bearer on demand. But while this Act was the direct cause of the inception of the great joint-stock banks which to-day overshadow in size even the Bank of England itself, it nevertheless added considerably to the Bank's prestige by providing that Bank of England notes should thenceforward be legal tender for all payments above £5, except by the Bank of England or any of its branches.

### The Bank Charter Act, 1844.

The currency and financial difficulties of the country were not, however, at an end, and the recurrence of failures among banks

<sup>1</sup> *Theory and Practice of Banking*, vol. ii., p. 380.

and commercial firms led to much controversy in financial circles concerning the regulation of bank note issues, many of the failures being attributed to the over-issue of notes by the Bank of England and by the numerous small private banks throughout the country. The controversy was marked by a considerable division of opinion in financial circles, two opposing schools of thought becoming gradually identified, upholding respectively the *Banking Theory* and the *Currency Theory*.

The exponents of the *Currency Theory* maintained that bank notes should be issued only in exchange for gold, and regarded such instruments merely as convenient and economical substitutes for metallic currency. The *Banking School*, on the other hand, held that the issue of notes was a necessary device to meet the constantly expanding requirements of trade, and that it was a function which could safely be left in the hands of the bankers who could be relied upon to issue only such notes as were necessary to meet trade requirements, and to ensure that adequate reserves were maintained and strict convertibility thereby ensured.

In spite of the fact that contemporary banking opinion was strongly in favour of the banking principle, the Government of the day was considerably influenced by the unhappy experiences of the preceding years, and ultimately decided that certain modifications were necessary in the constitution and powers of the Bank of England and in the system of note issuing in this country. These views were embodied in the famous Bank Charter Act of 1844, which, based mainly on the recommendations of the *Currency School*, aimed at regulating the issue of bank notes and ensuring the maintenance of adequate gold reserves at the Bank of England. As this Act was destined to influence the whole subsequent course of banking in this country, its provisions may be regarded as sufficiently important to deserve the brief recapitulation contained in the following paragraphs.

The main object of the Bank Charter Act was to provide against a continuance of the constant currency troubles of the preceding forty to fifty years, by imposing a strict control over the note issues of the country. At that time the Bank of England's active circulation of notes totalled approximately £20,000,000, while the circulation of the 279 country banks which were then issuing notes amounted to about £8,500,000. Accordingly, the promoters of the Act sought to achieve their object by establishing a strict control of the issue of the Bank of England, and by inserting in the Act provisions which would have the ultimate effect of wiping out the comparatively small local issues of the numerous country banks, and of concentrating the whole of the note issues in England and Wales in the hands of the Bank of England.

The ultimate extinction of the note issue of the country banks was ensured by the provision that no further banks of issue were

to be established, and that the note issue of each existing bank was to be confined to the amount of its average circulation during the twelve weeks preceding the 27th April, 1844. Moreover, a bank of issue was to forfeit its note-issuing powers in various circumstances, as for example, if it became bankrupt, or was absorbed by another bank, or if it opened an office in London. The effect of these provisions, accelerated by the intense process of amalgamation and absorption to which we have previously referred, was to bring about a gradual decrease in the total circulation of banks other than the Bank of England, and in 1920, three-quarters of a century after the passing of the Act, its object was achieved when the last private bank of issue, Fox, Fowler and Company, was absorbed by Lloyds Bank, Ltd.

The control of the issue of the Bank itself was directed to ensuring the absolute convertibility of its notes and ample publicity regarding its cash reserves, assets, and liabilities. The convertibility of the Bank of England note was safeguarded, firstly by the provision that the Bank's note issuing business and its ordinary banking business should be conducted by two entirely separate departments, known respectively as the *Issue Department* and the *Banking Department*; and, secondly, by the provision that gold (or silver not exceeding one-fourth of the gold) should be held in reserve by the Issue Department against every note issued by it in excess of a fixed total described as the *Fiduciary Issue*, and originally fixed by the Act at £14,000,000. Notes to this amount were to be issued against Government securities (of which £11,015,100 represented a book debt owing by the Government to the Bank), but it was further provided that the total should be increased from time to time upon the Bank obtaining an Order in Council permitting it to take up two-thirds of the lapsed issue of any private bank which had lost the right of issue under the provision of the Act referred to above. By virtue of this arrangement the fiduciary issue of the Bank of England has been increased to £19,750,000, although all profits made by the Bank on its fiduciary issue in excess of the original £14,000,000 belong to the Government.

Ample publicity regarding the financial position of the Bank is ensured by the provision that it must publish a weekly report or *Return* in the form prescribed by the Act, showing separately the liabilities and assets of its two departments. This weekly statement is of supreme importance to all connected with banking and finance, and gives such significant indications of the state of monetary conditions generally that it has been well described as the "Barometer of the London Money Market". An understanding of the meaning of each of its items and their variations is, in fact, essential to a proper understanding of the working of the banking and currency systems of this country.

### The Bank of England Return.

The weekly Return of the Bank of England is issued every Thursday after the meeting of the Bank Court of Directors, and is published by the Bank itself and in the principal newspapers in the following form :—

#### BANK OF ENGLAND

*Week ended Wednesday, April 28, 1926.*

##### ISSUE DEPARTMENT.

Notes issued.	£164,810,235	Government Debt.	£11,015,100
		Other Securities	8,734,900
		Gold Coin and Bullion	145,060,235
	<u>£164,810,235</u>		<u>£164,810,235</u>

##### BANKING DEPARTMENT.

Proprietors' Capital	£14,553,000	Government Securities	£39,495,328
Rest	3,201,678	Other Securities	67,822,284
Public Deposits <sup>1</sup>	18,925,367	Notes	23,712,810
Other Deposits	95,656,694	Gold and Silver Coin	1,312,041
Seven-day and Other Bills	5,724		
	<u>£132,342,463</u>		<u>£132,342,463</u>

<sup>1</sup> Including Exchequer, Savings Banks, Commissioners of National Debt, and Dividend Accounts.

The reader will see at once that the Return is nothing less than the balance-sheet of the Bank, giving on the left-hand side the liabilities of its two departments, and on the right-hand side their various assets. The previous analysis of the items in the balance-sheet of a joint-stock bank should therefore enable the reader to understand, without difficulty, the following explanation of the meaning of the items in the Return under consideration.

#### Issue Department.

The single item "*Notes Issued*" on the left side of the statement of the Issue Department represents, of course, the total amount of notes issued by the Bank, including the amount in the hands of the public and of the other banks, known as the Bank's *Active Circulation*, and also the amount of £56 millions held in reserve against the Treasury Note Issue, and of £23 millions held by the Bank itself as an asset in its Banking Department (see *post*, page 50).

On the right-hand side, the total of the two items "*Government Debt*" and "*Other Securities*" represents the paper "backing"

behind the £19,750,000 fiduciary issue, while the remaining figures give the amount of gold coin and bullion held in the vaults of the Bank as a cash reserve against its circulation of notes. It will be noted that, in spite of the power given by the Bank Charter Act, no silver is at present held by the Bank against its note issue, the cash holdings of the Issue Department consisting entirely of gold coin and bullion. At the present time the total under this heading represents practically the whole of the gold in the country, for during the Great War gold coins were withdrawn from circulation and passed to the Bank, their place in the circulating currency being taken by Bank of England Notes and Treasury Notes.

### Banking Department.

The items in the second portion of the Return closely resemble those in the balance-sheet which we have already analysed. On the liabilities side, we have first of all the "*Proprietors' Capital*", representing the amount invested in the Bank by its shareholders, for it must be constantly borne in mind that the Bank of England, although performing the functions of a central bank, is a private organisation run by its management primarily for the benefit of its proprietors.

The term "*Rest*" is unusual but simply means "surplus", and like the "*Reserve Fund*" of a joint-stock bank (see *ante*, page 30), represents an accumulation of undivided profits maintained to meet contingencies. The Rest also includes the balance of the Bank's profit and loss account out of which its dividends are paid from time to time, but the total of the Rest is never permitted to fall below three millions.

The two items "*Public Deposits*" and "*Other Deposits*" comprise the balances of the Bank's current account customers, the first total, as explained in the footnote, representing sums to the credit of various government departments, while the second figures indicate the total amount standing to the credit of customers at the Bank's London offices and provincial branches, including the balances of all the joint-stock banks. It should be observed that the term "deposits" may be misleading, for the Bank of England does not accept deposits at interest, and accordingly the balances here referred to, correspond more strictly with those of the joint-stock banker's *current* accounts.

Under the heading "*Seven day and other bills*" is given the extent of the Bank's liability in respect of its signature on bills of exchange, chiefly of the type known as "Bank Post Bills." (See *post*, Chapter 19).

The use of the term "*Securities*" in the first two items on the assets side of the statement of the Banking Department is peculiar to the Bank of England, for the two totals actually include, not only the Bank's investments in various securities, but also its *advances* on current account, in respect of which it

presumably holds securities considerably in excess of the amount loaned, as is, of course, the case with all other banks. Thus, the item "*Government Securities*" includes the Bank's investments in government stocks and in Exchequer and Treasury Bills, in addition to its loans to the Government on "Ways and Means Advances" and "Deficiency Bills", both of which are methods of borrowing resorted to by Government Departments to tide over temporary shortages pending the receipt of tax payments. Similarly, the item "*Other Securities*" includes the Bank's investments in securities other than those under the first heading, together with its loans to bill brokers and its many customers other than the State.

### The Bank of England Reserve.

The last two items on the assets side of the Return of the Banking Department—"Notes, Gold Coin, and Bullion"—amounting to about 23 millions in the Return given above, are the most significant of all, for they represent what is known as the *Bank of England Reserve*, i.e., the total amount of liquid funds which the Bank has available to satisfy the immediate requirements of the many important customers of its Banking Department. The total of these two items corresponds to the item "Cash in Hand" in the balance-sheet of a joint-stock bank, although, as we have noticed, they appear first in the average joint-stock bank balance-sheet. The reader will appreciate, therefore, that the total notes and cash held by the Banking Department is purely and simply a *banking* reserve, which must be clearly distinguished from the reserve of gold held by the Issue Department, for, as we have seen, the latter must be held and appropriated by the Bank solely to redeem its notes, whether those notes are held by the public, by the Treasury, by other banks or by its own Banking Department.

### The Bank of England and the Money Market.

The supreme importance of the items comprising the Bank of England Return can be fully appreciated only when we have clearly explained the relation of the Bank itself to the other members of the London Money Market, that remarkable organisation of bankers, bill brokers, discount houses and financiers in the City of London who deal in money and credit. The business of the Money Market may be summed up in two words—"borrowing" and "lending", while its dealers of many kinds belong to one or both of two great classes—they are borrowers or lenders or both.

The *lenders* of liquid funds are chiefly the joint-stock banks, whose second line of defence consists, as we have seen, in that proportion of their deposits which they employ on the market

as "Money at Call and at Short Notice", lending it at low interest in return for the facility of obtaining immediate repayment upon demand. The funds thus utilised by the banks comprise the greater part of the *short loan fund* of the Money Market, and in December 1925 amounted to the vast total of £114·5 millions, which, as Bagehot<sup>1</sup> pointed out, "can be lent to anyone for any purpose".

The *borrowers* of money are chiefly the bill brokers and discount houses, who employ the funds in discounting bills of exchange, and the Stock Exchange dealers, who utilise the funds for transactions in Stock Exchange securities. In addition the British, foreign and colonial governments and the foreign and colonial banks with offices in London, lend or borrow considerable sums on the market.

The Bank of England is well described as the pivot of the whole organisation, exercising through the Bank Rate a marked influence upon prevailing rates of interest, and maintaining a position of pre-eminent importance by virtue of its position as banker of the Government, of the other banks, and of many other important members of the Money Market.

The great significance of the Bank of England Reserve should now be apparent. In spite of the fact that the Bank conducts an ordinary banking business, all of its customers, and particularly the joint-stock banks, regard their balances at the Bank as being equivalent to cash and rely upon them for immediate replenishment of their available supplies of legal tender currency. Thus the Reserve in the Banking Department is regarded as a *cash* reserve, not only by the Bank of England itself, but also by all the other banks in the country and by all members of the London Money Market. If additional supplies of legal tender currency are required, the easiest and quickest way of obtaining them is to withdraw part of one's balance at the Bank of England, or to obtain an advance from the Bank against security and withdraw the loan in bank notes or gold.

Let us suppose, for example, that a bank in Leeds requires £1,000,000 to meet a sudden large demand for repayment of deposits. An urgent request for supplies is forwarded to the London Office, which will no doubt obtain them by drawing upon its account at the Bank of England, the effect being to reduce Other Deposits and the notes or cash in the Banking Department by the amount withdrawn. Since the Cash Reserve and Other Deposits are thus reduced by an equal amount, it follows that the *ratio* of Reserve to liabilities is also reduced. The Reserve is also lessened when the Bank grants a loan. Thus if a Government Department borrows £1,000,000 in cash, Government Securities rise by that amount, the notes or cash in the Banking Department are correspondingly reduced, and there is again a decrease in the ratio of Reserve to liabilities.

<sup>1</sup> *Lombard Street.*

When, therefore, it is appreciated that the amount of the item "Other Deposits" includes many millions of money belonging to other banks which may be heavily drawn upon at a moment's notice, it is not surprising that there are times when the Reserve is very severely depleted, more especially because borrowers on the London Money Market invariably resort to the Bank for loans when they are unable to obtain accommodation elsewhere. This is particularly the case in times of financial stress, for at such periods depositors lose confidence and make heavy withdrawals from their accounts with the other banks, compelling the latter to strengthen their position by calling in their loans and curtailing their advances to customers. As a result, the Bank is subjected to heavy withdrawals by its deposit customers and to demands for accommodation from all sides.

In consequence of such factors the Reserve has at times been so seriously depleted that the Bank has to be given Government authority to increase its fiduciary issue to enable it to pay out gold or notes to those who desire them. Serious depletion of the Bank Reserve usually arises when heavy withdrawals for internal purposes (as at the holiday seasons when greater supplies of circulating cash are necessary) coincide with a demand for gold for export abroad, or when the failure of public confidence either at home or abroad causes both internal and external demands for cash from the Bank of England.

### **The Protection of the Bank Reserve.**

In the circumstances to which we have previously referred, it is only to be expected that the Bank should from time to time take special measures to protect its reserve and maintain an adequate ratio of cash to its liabilities. Thus, in pre-war days the Bank sought to keep the ratio of its cash and convertible notes to its total liabilities in the neighbourhood of 50 per cent., but since the Great War the demands upon its resources have been so considerable that it has had to be content with a much lower proportion, as is indicated by the return on page 48, in which the ratio of reserve to total liabilities is about 20 per cent.

In endeavouring to safeguard its reserve the Bank obviously cannot refuse to satisfy the demands of its depositors, but it can discourage applications for advances by raising the *Bank Rate*, which is the minimum rate of interest at which the Bank will grant advances upon approved security or discount bills of exchange for persons other than its regular customers.

So far as the Bank of England is concerned the usual effect of raising its rate is to lessen the demand upon it for loans of funds, but other important results also ensue by reason of the fact that the Bank of England rate of discount is the basis upon which all other rates for the loan of money are fixed. The joint-stock banks fix their rates of interest on deposit accounts (i.e., the



rates at which they obtain loans from their customers) at 2 per cent. below the Bank Rate, and accordingly any movement in the latter is followed by the corresponding adjustment of the *Bankers' Deposit Rate*. Furthermore, if the bankers are compelled to pay higher interest on deposits in consequence of a rise in the Bank Rate, they naturally seek to recoup themselves by charging higher rates of interest for loans to their customers, including the bill brokers and other market dealers who, having to pay more for the funds with which they operate, increase their own charges for discounting bills and making loans on the London Money Market.

In other words, the rise in the *Bankers' Call and Seven Day Rates* (charged respectively for loans of money at call and short notice to the Money Market) causes corresponding rises in the *Market Rate of Discount*, which is the rate charged by members of the Money Market for short term loans and also the rate charged by the Bank of England for similar loans to regular customers. Finally the rise in the market rate in its turn compels an increase in the deposit rates allowed by the brokers and discount houses for money left with them at call and short notice.

The following table will serve to illustrate the interrelation of the various discount and interest rates prevailing on the London Money Market :—

LONDON RATES OF DISCOUNT AND INTEREST

	May 21, 1926.	May 22, 1926.	May 24, 1926.	May 25, 1926.	May 26, 1926.	May 27, 1926.	May 28, 1926.
Bank rate (changed from 4% Dec. 3, 1925)	5	5	5	5	5	5	5
Market rates of discount—							
60 days' bankers' drafts	4½	4½	4½	4½	4½	4½	4½
3 months' do.	4½	4½	4½	4½	4½	4½	4½
4 months' do.	4½	4½	4½	4½	4½	4½	4½
6 months' do.	4½	4½	4½	4½	4½	4½	4½
Discount (Treasury Bills)—							
3 months	4½	4½	4½	4½	4½	4½	4½
3 months <sup>1</sup>	4½	4½	4½	4½	4½	4½	4½
Loans—							
Day to day	3½ 4	3½ 4	4 ½	4 5	4 5	4 ½	4 ½
Short	4	4	4	4	4	4	4½
Deposit allowances—							
Banks	3	3	3	3	3	3	3
Discount houses at call	3	3	3	3	3	3	3
At notice	3½	3½	3½	3½	3½	3½	3½

<sup>1</sup> Additional to those offered by tender in the preceding week.

It will thus be seen that the general result of a rise in the Bank Rate is to raise rates of interest for loans both in the London Market and in the country at large. On the one hand, borrowing is discouraged, while, on the other hand, depositors are induced to leave their balances undisturbed and even to increase such balances as much as possible in order to benefit from the high rates of interest. Consequently, the deposits of the banks tend to increase, their surplus funds tend to rise and

ultimately the addition to their cash holdings finds its way into the vaults of the Bank of England, the inflow being indicated by a rise in the Reserve and by a corresponding rise in the total of Other Deposits, while the proportion of Reserve to liabilities is improved.

### The Bank Rate Not Always Effective.

Clearly the influence of the Bank Rate is of the greatest importance in banking and financial circles, but the raising of the rate is not always successful in bringing about a decrease in borrowing and an increase in deposits. It is most effective when money is scarce, for at such times lenders are anxious to make the best of the shortage in the supply of loanable capital and to get as high a rate as possible for their advances, while borrowers are frequently compelled to resort to the Bank for such accommodation as they require, obtaining it, of course, on the Bank's own terms. When, however, supplies of money are plentiful the effectiveness of the Bank Rate is less marked, for at such periods the banks and other lenders endeavour to get whatever they can for their surplus funds, competition between them tending to keep down their rates for loans.

In the Money Market, as in any other market, the rate or price charged for the commodity, money, depends essentially upon the relation between the supply and the demand, and no artificial lever such as the raising of the Bank Rate can be relied upon always to operate effectively in the face of opposing economic tendencies. In such circumstances the Bank has to adopt other measures to influence market rates in order to safeguard its Reserve, its usual plan being to reduce the supplies of floating money on the market by borrowing the surplus itself, against the security of Consols or other stock.

In times of acute financial difficulty the normal measures taken by the Bank to protect its Reserve have proved inadequate, and on such occasions (the last occasion—apart from the extraordinary conditions of 1914—was in 1866) the Bank has been compelled to seek Government authority to issue additional currency in order to satisfy the demands of the community. No power to issue such currency is provided under the Bank Charter Act,<sup>1</sup> but by special sanction of the Treasury the Bank is empowered to increase its note issue without depositing a corresponding amount of bullion, the arrangement being known as the *Suspension of the Bank Act*.

In the emergency which accompanied the outbreak of war

<sup>1</sup> Under our existing currency arrangements the Treasury still has power under the Currency and Bank Notes Act, 1914, to issue currency notes in excess of any limit fixed by law. Until the Bank of England and Currency Note issues are amalgamated the only check on currency expansion is the Treasury Minute of 1919. (See *post*, p. 102.)

in 1914, the Treasury was prepared to grant to the Bank an indemnity against any action it might take contrary to the provisions of the Bank Charter Act, but owing to the arrangements made in the Currency and Bank Notes Act, 1914, for the issue of emergency currency, the Suspension of the Bank Act was unnecessary.

### **Movements in the Bank Return.**

The reader is now in a position to understand why the appearance of the Bank Return is eagerly awaited by the London Money Market, and why its weekly figures are carefully scrutinised by bankers and other members of the financial world whose business is intimately concerned with the lending and borrowing of money. The trained eye can appreciate at once the significance of any important changes in the figures since the appearance of the last Return, and can discriminate between certain marked periodical fluctuations and abnormal movements which are likely to react on financial conditions generally. In particular, the market expects to find considerable changes in the totals of "Public Deposits" and of "Other Deposits" at the end of each quarter, for the payment of the heavy dividends on government stocks (and especially upon the loans raised during the Great War) results in considerable transfers from "Public Deposits" to the accounts of the banks included in "Other Deposits", thus increasing the surplus funds of the banks and causing rates of interest on the Money Market to fall or to "ease", as it is technically termed. On the other hand, contrary influences are at work in the March quarter and in July, when the payment of income and other taxes causes heavy transfers to be made from "Other Deposits" to "Public Deposits".

Again, the market has learned to anticipate each half-year the effects of the so-called "window-dressing" operations of the banks, whereby they endeavour to present a strong position in their balance-sheets by calling in part of their loans at short notice and thereby increasing their balances at the Bank of England. Such operations tend to reduce the supplies of floating capital on the Money Market, causing a "hardening" of interest rates and forcing the market borrowers to resort to the Bank for accommodation, which, on being granted, is followed by a rise in Other Securities.

In addition to the foregoing, experienced financiers can forecast with a fair degree of accuracy, the effect on the Bank Return of such important factors as the issue of a great war loan, when Public Deposits are swollen by the millions received from public subscriptions, or as the payment of a large instalment of war debt and interest by the British Government to our American creditors. Expected movements of this kind, or the periodical fluctuations which we have described, are regarded with equa-

nimity, since those whose business it is to deal in loans of liquid funds can make their future arrangements with due regard to the anticipated effects upon market conditions generally.

Frequently, however, the appearance of the Bank Return is the first intimation received by the market that anything unusual has taken place or that unexpected conditions are likely to rule in monetary circles. Thus the Return may be the market's first warning of a heavy fall in the Bank's Reserve—such as may follow a large withdrawal of gold from this country—and dealers may not be entirely prepared for the stiffening of interest rates which may be expected to ensue. In a similar way, a large addition to the Bank's Reserve from outside sources may result in a period of monetary ease which bankers and other market operators may not have anticipated in view of the prevailing conditions. Again, it may be stated that as a general rule, a high level of Other Deposits indicates that the banks have a surplus of unemployed funds, and is usually a precursor of low interest rates and "cheap money". Nevertheless, the sudden increase in Other Deposits at the same time as a rise in the Bank Rate and in the total of Other Securities tells the market that for some reason the banks find it necessary to strengthen their position by calling in loans, thus forcing market borrowers into the Bank, causing Other Securities to rise and inducing the Bank to stiffen rates of interest in order to decrease borrowings and so protect its Reserve.

Unexpected movements of this kind naturally result in a considerable disorganisation of market arrangements, and when it is realised that considerable sums are lent and borrowed on the market at extremely fine rates involving only a very small margin of profit, it will be readily appreciated that the appearance of the Bank Return may necessitate an immediate adjustment of commitments. For this reason its figures are carefully analysed by those whose business depends on the position there disclosed.

### The Central Reserve System.

At an earlier stage in our survey reference was made to the *Central Reserve System*, which is the name applied to the arrangement whereby the surplus cash balances of the banks in this country are left in the hands of the Bank of England, a private institution conducting an ordinary banking business for the benefit of its proprietors. In other countries the central banking institution fulfilling such functions, is usually a state organisation under strict government control and supervision, and it is therefore not surprising that the arrangement which exists in this country is frequently subjected to considerable criticism, and that from time to time proposals have been made with the object of removing the dependence of our financial arrangements and monetary conditions upon the policy of an institution whose

banking business is free from state control and which is not legally responsible to the nation.

Thus it is asserted in some quarters that the Reserve maintained at the Bank is entirely inadequate for its purpose, and that the establishment of a strong independent reserve by the joint-stock banks would not only tend to prevent the frequent changes in the rate of discount which have such a disturbing influence on business generally, but would also ensure that any changes made were in the interests of the banks and of the nation as a whole, and not, as is sometimes suspected, in the interests only of the Bank of England, which is, of course, in active competition with the other banks. In spite of such criticisms, however, it is to the credit of the present system that it has worked with notable smoothness and efficiency for a long period of years, and that, following the vast economic upheaval of the Great War, the Cunliffe Committee of 1918 was unanimous in its opinion that with slight modifications the arrangements now existing are best suited to the peculiar organisation of the banking and financial mechanism of this country.

## CHAPTER 5

### THE INTERNAL ORGANISATION OF A BRITISH BANK

It would be clearly impossible in the space at our disposal to describe in detail the organisation of a typical British bank, but even the reader who is already acquainted with the structure of the institution with which he is connected should be materially assisted by the following brief review of the essential features of the organisation of a modern joint-stock bank.

#### The Branch System.

We have previously observed that one of the chief characteristics of British joint-stock banking is the spread of the Branch System, which involves the control by a strong directorate and management at Head Office, usually in London, of a vast network of branches and agencies in numerous provincial towns. Some idea of the extent of this development may be obtained from the following table :—

#### Deposits and Number of Branches of the "Big Five", December 1925.

BANK.	DEPOSITS. (Million £)	BRANCHES.
Barclays . . . . .	306	1834
Lloyds . . . . .	337	1686
Midland . . . . .	348	1850
National Provincial . . . . .	254	1132
Westminster . . . . .	271	918

The effective control of organisations of this magnitude could not be accomplished without the delegation of considerable authority to the managers who are placed in charge of the various branches, but it is, of course, essential that the work of each branch should be conducted on the same general lines, and that the records and accounts at each branch should be kept in such a way that they can be woven without difficulty into the general records and accounts for the whole of the bank's organisation which are maintained at its Head Office. Thus, while each local manager has wide discretionary powers in regard to such matters

as the acceptance of customers, the granting of loans within certain limits, and the general procedure and arrangements at the branch, the Head Office ensures the conformity of each branch with the established practice of the bank by arranging for periodical reports—daily, weekly, monthly, etc., as the case may be—to be compiled and sent to Head Office, and also by arranging surprise visits at irregular intervals by inspectors having the full confidence of the general management.

### **The Inspection System.**

As the representative of Head Office, the inspector is necessarily vested with considerable powers, and while he seeks to give reasonable consideration to the methods and wishes of each manager, he is nevertheless responsible for seeing that the work and business at each branch is conducted in accordance with the traditions and principles of the bank. At the same time, he is expected to carry out a thorough audit of the books at the branch, including the certification of the cash balance and securities, and to satisfy himself concerning the advances made by the manager whether on current or loan account or on bills discounted. In the case of large branches, this work is necessarily delegated to more than one inspector, but it will be appreciated that it is essential for the effectiveness of such verifications that they should be undertaken by officials of proved competence and undoubted impartiality, and that they should be carried out at irregular periods and without any previous warning to the branch managers or to the branch staff.

### **PERIODICAL RETURNS**

The system of obtaining periodical returns from each branch is necessary in order to ensure an effective control of its operations, and also to permit of the inclusion of its records and figures in the general records and accounts maintained at the Head Office.

#### **Daily Returns.**

In the first place, it is essential that the Head Office should have daily advice of the exact amount of cash held by each branch, so that the management may have precise information as to the distribution and extent of the bank's cash resources. Accordingly, a statement of the cash in hand is submitted to Head Office by the manager of each branch at the close of the day's business, being embodied in what is known as the "Head Office Daily Return" or the "London Letter", a typical sheet of which is reproduced on page 61. It will be noted that this includes also such items as acknowledgments of cash or other remittances

from Head Office received by the branch, advice of the issue of drafts or banker's payments upon Head Office, and advice of the totals of remittances of cheques, bills, notes or coupons being despatched to Head Office by the same mail.

Corresponding to this daily return forwarded by each branch is the "Head Office Advice", received from Head Office every morning by each branch, and containing acknowledgments of cash and other remittances received from the branch, together with advice of the totals of the day's "Clearing" (i.e., cheques and bills drawn upon the branch and received from the London Clearing House—see *post*, Chapter 15), which is being despatched by the same mail.

It may be added that these daily returns between Head Office and branch are forwarded in envelopes specially designed for the purpose, and that they are accompanied by any special letters directed, on the one hand, by the manager to officials at Head Office, or, on the other hand, to the manager by the Head Office executive. It will be readily understood that a considerable amount of special correspondence is required to deal with such matters as the granting of advances, the appointment and promotion of staff, the upkeep and extension of premises, and the opening of new branches or agencies.

### Weekly Returns.

It will have been noticed that the daily return from branch to Head Office does not include a statement of assets and liabilities of the branch other than cash, but it is, of course, imperative that the general management should have frequent and accurate information as to the amount borrowed by each branch from its customers on current and deposit account, together with details of its loans and advances on current account and on bills discounted. In order to achieve this it is necessary for each branch to take out the balances of its books and to "balance" them accurately once in every week, after which a statement known as the *Weekly Abstract* is compiled, carefully checked and forwarded to Head Office. This matter is dealt with at page 84.

### Returns of Advances.

It has been observed in a previous chapter that the success of a bank's business depends essentially upon the ability of its officials to *lend* money, and accordingly considerable importance is attached by the general management of the large banks to the efficient control of all advances made by the branches. While a branch manager may accept deposits up to any amount on the bank's usual terms, his power to grant loans is strictly limited, and, as a rule, each branch manager is required to obtain Head



**BRANCH DAILY ADVICE SHEET TO HEAD OFFICE.**

THE NORTHERN BANK LIMITED

NORTHTOWN BRANCH.

Last Letter from this Branch sent \_\_\_\_\_ with \_\_\_\_\_ Bills £ \_\_\_\_\_ and Cash £ \_\_\_\_\_  
 Do. " Head Office dated \_\_\_\_\_ received with enclosures, Bank of England Notes £ \_\_\_\_\_  
 Treasury Notes £ \_\_\_\_\_ also received

**ORDERS FOR NOTES.  
NOTES REQUIRED.**

No. of Notes required.	Denomination.	Amount.
_____	£ 1	£ _____
_____	10/-	£ _____
_____	£ 5	£ _____
_____	£ 10	£ _____
_____	£ 20	£ _____
_____	£ 50	£ _____
_____	£ 100	£ _____
_____	£ 200	£ _____
_____	£ 500	£ _____
_____	£ 1000	£ _____

TOTAL £ \_\_\_\_\_

Manager.

CASH ON HAND at close of business.		Surplus.
Bank Notes	£ _____	£ _____
£1 . . .	£ _____	£ _____
10/- . . .	£ _____	£ _____
Sovs. . . .	£ _____	£ _____
½ Sovs. . .	£ _____	£ _____
Silver . . .	£ _____	£ _____
Copper . . .	£ _____	£ _____

TOTAL £ \_\_\_\_\_

**REMARKS.**

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\_\_\_\_\_ Manager.

MITTED TO HEAD OFFICE this day, under another cover, together with specifications relating thereto —

- No. \_\_\_\_\_ Bills Remitted . . . . . £ \_\_\_\_\_
- No. \_\_\_\_\_ Bills for Acceptance and Return . . . . . £ \_\_\_\_\_
- Cash amounting to . . . . . £ \_\_\_\_\_
- Coupons do. . . . . £ \_\_\_\_\_
- Stock do. . . . . £ \_\_\_\_\_
- £ \_\_\_\_\_
- £ \_\_\_\_\_
- £ \_\_\_\_\_

**REMITTANCES TO COLONIAL & FOREIGN DEPARTMENT.**

NORTHTOWN BRANCH. Sec. 1 No. \_\_\_\_\_ Foreign Bills for Collection . . . . . £ \_\_\_\_\_  
 " 3 } Foreign Securities: Coupons and Dividend . . . . . £ \_\_\_\_\_  
 " 2 } Warrants for credit of Hold a/c . . . . . £ \_\_\_\_\_  
 " 4 No. \_\_\_\_\_ Foreign Bills for Sale . . . . . £ \_\_\_\_\_  
 " 5 No. \_\_\_\_\_ Foreign Drafts, etc., to be cancelled £ \_\_\_\_\_  
 " 5 Foreign Notes and Coins . . . . . £ \_\_\_\_\_

Date \_\_\_\_\_

The Accountant is held personally responsible for the following figures being correctly stated and added, as well as for the correctness of the addition of the advices under the different Heads in the annexed sheet.

Any alterations in these totals to be wired at once to H. O.

**SUMMARY OF TOTALS OF ADVICES HEAD OFFICE IS THIS DAY CREDITED FOR AS PER ANNEXED SHEET THE FOLLOWING CHEQUES RECEIVED, viz. —**

Drafts and Drafts on Demand in one Total	_____	County Clearing . . . . .	_____
Bills to be retired . . . . .	_____	Add. Branch Clearing . . . . .	_____
Bankers' Payments . . . . .	_____		
Credits for City Office Customers . . . . .	_____	Enter this Total only on Transfer Sheet } £ _____	
Enter this Total only in State under "Payments" } £ _____			

NORTHTOWN BRANCH. Certified by \_\_\_\_\_ Date \_\_\_\_\_ Accountant \_\_\_\_\_

Office sanction for all overdrafts in excess of a fixed limit, known as the "*manager's discretionary power*".

Even when the advance is granted, however, the Head Office takes care to ensure that it shall be kept well posted as to the state of the loan and the conditions of the security, requiring each manager to make frequent periodical reports upon all advances, giving full details of the security held and of the nature and extent of the operations on the account. In addition to this, special reports are required from time to time if the specified limit granted to each customer is exceeded or if any other special circumstances arise. These reports are thoroughly investigated by responsible officials of the Head Office Advance Department, who are enabled to keep the general management fully informed of the state of the lending operations at each branch, and also to advise upon the amount of provision, if any, which should be made to cover actual or possible losses or bad and doubtful debts.

### The Half-Yearly Returns.

It is, of course, essential that *all* returns to Head Office should be compiled with care and accuracy, but no bank clerk needs to be reminded of the labour and diligence which are bestowed by each branch upon the preparation of the Half-yearly (in some banks, the Quarterly) Returns. For the majority of bank men the "*Balance*" means a period of strenuous work, sometimes extending for days into the early hours of the morning, and it is therefore to be expected that most readers of this book will be well acquainted with the objects and procedure at the half-yearly or quarterly audit of the branch books.

The main object of the balance is to provide the figures from which the profit and loss account and the balance-sheet of the bank may be drawn up, and, apart from the many incidental duties which have to be carried out at this time, the feverish activity at each branch is directed primarily to the compilation for Head Office purposes of the modified profit and loss account and balance-sheet for the branch concerned. This involves chiefly the charging of interest and commission on all advances, the crediting of interest on deposit accounts, and the calculation of such items as interest outstanding but not paid on deposit receipts and of discount charged but actually unearned on bills of exchange still to fall due, together with a thorough audit of cash, securities and accounts by the accountant or other responsible official. All calculations and postings are checked by at least a second official, all the books of the branch are balanced, all the accounts are closed, and all outstanding balances are carried down to the ensuing half-year.

The comprehensive statement in the form of a balance-sheet

known as the "*Half-Yearly Abstract*" is then compiled. This is similar in form to that on page 86, and, after being exhaustively checked, it is authenticated by the signatures of the manager and accountant, and is forwarded to Head Office with detailed supplementary statements containing full particulars of all current and deposit accounts open at the branch, details of accounts opened and closed during the previous half-year, particulars of all debtor accounts with the security held, etc., details of bills discounted and past due bills, and certificates signed by the manager and accountant as to the correctness of the cash and convertible securities held at the branch. It will thus be seen that the "Balance" is really a half-yearly or quarterly audit of the books of each branch, conducted under the direction and responsibility of the manager and his chief assistant or assistants.

Upon their receipt at the Head Office, the statements from each branch are verified by the Head Office officials and also by independent auditors, and are incorporated in the Head Office books prior to the compilation of the profit and loss account and balance-sheet for the bank as a whole. In addition to this the detailed returns relating to loans and overdrafts, bad and doubtful debts, accounts opened and closed during the half-year, return of overdue bills, etc., are all carefully scrutinised by responsible officials, who make such reports as may be necessary to the general managers and thereby enable them to form an accurate estimation of the progress and position of the institution generally and of its individual branches in particular.

### Special Reports.

Apart from these periodical returns, it is not uncommon for special returns on certain aspects of the bank's business to be called for from time to time by the general management, and, quite apart from thus keeping in touch with the actual business of each branch, the central executive keeps itself fully acquainted with the trade and industries in each district by requiring comprehensive reports upon such matters to be submitted from time to time by the local managers.

It will thus be seen that although local sentiment has tended to disappear from British banking as a result of the absorption of the small private banks and the extension of the joint-stock organisations, the centralised management nevertheless take very active steps to keep themselves fully informed of local needs and of the extent to which such needs are being met by their branches and agencies.

## THE HEAD OFFICE ORGANISATION

It is not possible within the limits of this chapter to explain at length the intricate organisation of the Head Office of a large

joint-stock bank, apart from which each bank has its own particular system and its own method of departmentalising its complex mechanism. Furthermore, each Head Office, in addition to controlling and centralising the work of its network of branches, conducts also an ordinary City banking business, which is, of course, generally similar to that of any of the branches, subject to modifications in the arrangements necessitated by the proximity of the City office to the general management, and to its intimate relationship with the money market, the foreign exchange market and the Stock Exchange.

### **Advance Department.**

In what we might call the Head Office proper, are usually to be found a number of specialised departments, each dealing with one particular aspect of the bank's work, and under the control of important executive officers responsible to the general managers. Of these special departments possibly the *Advance Department* takes pride of place by virtue of the fact that it controls the lending operations of the bank, upon which, as we have seen, the success of the institution largely depends. In this department are kept, under highly efficient supervision, records of every loan and advance granted by the City office and by the bank's branches throughout the country, together with details of the securities held thereagainst. In exercising this general supervision, the controllers endeavour to safeguard the bank as much as possible against bad debts, and at the same time to ensure that its advances are as widely distributed as possible in a large number of comparatively small loans, for as we have previously observed, a bank's stability may be endangered if its advances are largely confined to certain particular districts or if its fortunes are too closely bound up with the prosperity of certain great industries.

### **Securities Department.**

Second in order of importance we may place the *Securities Department*, which is responsible for maintaining accurate and complete records of all negotiable and other securities kept in the custody of the bank, either as security in respect of advances granted by the bank to its customers or for safekeeping on behalf of the owners. In addition to maintaining such records, the officials in charge are responsible for seeing that documents conveying property of any description to the bank as security are legally drawn up and correctly stamped. They also undertake responsibility for the drafting of any standard or special agreements and deeds which may be required in connection with the bank's business. Clearly, work of this kind requires a comprehensive knowledge of the borrowing powers of different

individuals and corporations, an understanding of all forms of security accepted by the bank, and a thorough acquaintance with contractual rights and obligations and with legal formalities and procedure.

### **The Accounts Department.**

This department exercises the highly important functions of collating and verifying the accounts of all branches of the bank's organisation, including the incorporation in the Head Office books of the figures supplied in the periodical statements by branches and agencies both at home and abroad. The accounting system of a large joint-stock bank is necessarily a very intricate one, but in broad outline it may be said to involve the keeping of a separate current account ledger for each branch, the entries in which are made from day to day in accordance with statements received by the Accounts Department from the branch concerned and from the other departments of the Head Office. In addition to controlling the work of his department, the chief accountant is also responsible for submitting to the management accurate returns showing the state of the bank's assets and liabilities at any particular date, and especially of compiling the bank's formal balance-sheet at the expiration of its quarterly or half-yearly accounting period.

### **The Bill Department.**

In this department is undertaken the recording and control of all bills of exchange discounted by the bank for its customers—including the bill brokers who lodge parcels of bills as security for loans of money at call and short notice—and also the collection of all home and foreign bills on behalf of customers. In some banks all bills discounted by the branches are forwarded to the Bill Department, where, after careful inspection, they are recorded in special books kept for the purpose and are retained until maturity, when they are forwarded for collection to their respective destinations. In other banks all bills discounted are retained at the branch, the officials of which are responsible for their due presentment and collection at maturity.

### **The Stock Department or Stock Office.**

This office is concerned with the purchase and sale of stocks and shares on behalf of the bank itself and of its customers throughout the country. All such transactions are passed through the hands of official brokers, who acknowledge the large amount of business passed to them by the bank by allowing it one-half of the brokerage which they are ordinarily accustomed to charge.

### **The Coupon Office.**

Closely allied to the Stock and Share Department is the *Coupon Office*, which is responsible for the collection and sale either at home or abroad of the coupons detached by the branches from securities held on behalf of customers, together with coupons which are specially handed in at the branches by customers for collection and credit of the proceeds.

### **The Foreign Branch or Department.**

In recent years the foreign business transacted by the joint-stock banks has increased to a remarkable extent, not only because they have opened branches and extended their agencies abroad, but also because they now undertake a considerable proportion of that foreign exchange business which in pre-war days was conducted almost entirely by the foreign banks having offices in the City. So important has this foreign business become in the case of the large joint-stock banks that their foreign departments or branches are nowadays separately housed with their own special staffs and accountancy systems, and, in particular, special appliances for the conduct of their manifold operations with foreign centres. Whereas in pre-war days the foreign departments of the joint-stock banks were of comparatively minor importance, they now conduct an extensive and remarkably intricate business with all parts of the world, and are credited with making substantial profits for the institutions they serve.

### **Other Departments.**

In addition to the foregoing principal divisions of the Head Office organisation there are also several other specialised departments of smaller size but of considerable importance, among which may be mentioned the Secretary's and Registrar's Offices, and the Inspection, Intelligence, and Staff Departments.

THE SECRETARY and REGISTRAR of a joint-stock bank naturally perform duties very similar to those of the corresponding officials in other joint-stock companies. Thus the Secretary is responsible for the preparation of the agendas and minutes of all meetings of the Board of Directors, together with the compilation of such reports and statistical data as may be required from time to time by the management. In some banks the Secretary also acts as an intermediary between the staff and the directorate, being responsible for the conduct and notification of staff transfers and promotions. The duties of the Registrar include the recording of all details relative to the bank's share capital, including the duties of recording transfers, issuing dividend warrants and share certificates, and communicating with the bank shareholders on any other matters.

THE INSPECTION DEPARTMENT, under the direction of the bank's chief inspector, is responsible for the official control of all inspectors in the bank's service, and for ensuring that every branch is subject to a rigorous inspection at sufficiently frequent intervals. Comprehensive reports are drawn up for the information of the general management, and such steps are initiated by this department as may be necessary to ensure the efficient and proper conduct of the bank's business.

THE STAFF AND INTELLIGENCE DEPARTMENTS are of comparatively recent origin, both being the result of the vast strides made in banking organisation during recent years. As its name implies, the Staff Department devotes itself essentially to all matters affecting the efficiency and welfare of the staff, and to the maintenance of the records upon which appointments and promotions are made from time to time. The Intelligence Department is concerned primarily with the collecting and collating of financial and economic information, upon which are based reports and statistical returns for the guidance of the general management and of the branch managers. The business of the joint-stock banks is nowadays so extensive, and their interests are so intimately bound up with trade and industrial conditions generally, that it is obviously essential for those in command to have reliable and up-to-date information of all important economic factors and movements. It is the business of the Intelligence Department to supply such information in a readily accessible form, and as a part of this function they undertake the compilation and publication of the Monthly Bulletins now issued by the joint-stock banks with the object of providing their officials, correspondents, and customers with valuable and up-to-date information on current economic and financial matters.

## THE BRANCH ORGANISATION OF A JOINT-STOCK BANK

While the organisation of the Head Offices of the joint-stock banks may differ considerably one from another, the conduct of business at the respective branches does not present material differences, although each bank may have its own special methods of recording transactions and making returns to the Head Office. Accordingly, we can best explain the organisation of a typical joint-stock bank branch by briefly considering the nature of the transactions effected at a branch of average size during an ordinary business day.<sup>14</sup>

In the first place it may be reiterated that the business at each branch is in charge of a manager, directly responsible to the general managers at Head Office, and assisted by an accountant, one or more cashiers, and a staff of clerks, varying in number according to the size of the branch.

### **The Manager.**

The chief function of the manager in any branch is to keep in close personal touch with the bank's customers, and to exercise a careful supervision of its advances. The business of accepting deposits and of conducting the routine work of the branch can be left largely in the hands of subordinate officials, but in every branch, as in the Head Office itself, the success of the manager and the earning capacity of his branch depend essentially upon his ability as a lender. This must not be taken to mean that every manager should not do his best to attract deposits, but it does imply that whereas the majority of deposit customers usually come to the bank of their own accord, the bank manager who is endowed with the gift for lending can do a great deal to enhance his own reputation and that of the bank by seeking local outlets for the bank's loanable capital, and by demonstrating his willingness to assist local traders with funds for development purposes.

### **The Accountant.**

In addition to assisting with the essentially managerial functions, the accountant, as his designation implies, is responsible under the manager for the accuracy and completeness of all records and accounts kept at the branch, and of all statements and returns emanating from the branch. In addition, he is expected to supervise the staff both from a disciplinary and executive point of view, and to keep the manager posted with any information relative to the business and work of the branch which may be of use and interest.

### **The Cashier.**

The essential duties of the cashier or cashiers are to carry out or to supervise all transactions at the branch involving the receipt and issue of cash, and to see that the cash held in the branch safe or tills corresponds exactly with that shown in the branch books. Apart from the fact that the work of a cashier necessitates absolute trustworthiness and strict accuracy, it is, of course, imperative that the responsibility for the cash at each branch shall be very definitely fixed, and accordingly it is arranged that no members of the staff other than the cashier or cashiers shall interfere in any way with cash transactions unless special arrangements are made for them to "take over" temporarily. Furthermore, as a safeguard against delinquencies on the part of those responsible for the cash, it is usually provided that the whole of the cash at the branch shall be checked at least once a week by the manager himself or the accountant, while in no circumstances is the cashier allowed to make entries in any



books of the branch other than those necessary for the maintenance of his own records.

### The Clerical Staff.

The clerical staff of a branch bank is necessarily engaged on more or less routine duties of a varied nature, dependent largely upon the size of the branch and the particular class of business which it conducts. In all except the smallest branches the chief clerk acts as assistant to the manager and accountant, usually conducting the correspondence and keeping the more important records of the branch, such as those relating to customers' securities and the summary accounts of the branch included in its General Ledger (see below).

The duties of the remaining clerks involve the writing up of the ordinary books, records, and returns of the branch, the filing of letters and other documents, the copying and despatch of letters, and similar duties of the type ordinarily associated with the conduct of a business office.

Some of the larger offices of the banks conduct such an extensive business that they may be regarded as (and frequently are nothing less than) miniature head offices, in which cases they are usually departmentalised on lines somewhat similar to those of the central institution. Furthermore, the policy of *decentralisation* followed by some of the banks in recent years has resulted in the conversion of certain of the larger branches into local head offices, which undertake a considerable part of the work of general management relating to the area concerned.

### A TYPICAL DAY IN A BRANCH BANK

As we have already stated, there are few essential differences between the systems of business and organisation adopted by the joint-stock banks in the conduct of their branches, and a brief consideration of the daily routine at a typical branch will thus enable the reader to form a fair idea of the nature of the operations and the duties of the staff at a typical branch bank.

It is frequently stated that the average bank clerk leads what is colloquially described as "a gentleman's life", for the majority of the public appear to assume that the hours of bank staffs are those which each bank is required to display in a prominent position for the guidance of its customers. This is, of course, an entirely erroneous impression. The staff ordinarily assemble about one hour before the branch is timed to open, and during this period they are engaged not only in making preparations for the business of the day, but also in dealing with the items which have been received by post. On his arrival, the manager or accountant proceeds to open the day's mail, which

will include the daily letter from Head Office with various enclosures, and also letters from customers, branches, and other banks enclosing remittances, containing requests for payments, or dealing with sundry matters arising out of the bank's business.

The Head Office letter will include correspondence addressed to the manager from the general management, such as letters relating to staff, premises, advances, etc., together with circulars issued by the Head Office to its branches generally and letters of advice or acknowledgment from the Head Office departments. In addition, the letter will include the morning's *branch and country clearings*, i.e., the cheques drawn by sundry customers of the branch and received by the Head Office from other branches and from the Clearing House on the previous day, the totals of which are given on a special form described as the *Head Office Advice*. After the amounts of the individual cheques have been entered by one of the clerks in a special book kept for the purpose and their total verified, the cheques are passed to the clerk or clerks in charge of the ledgers containing the customers' accounts. The cheques are carefully scrutinised by the clerks concerned, with a view to determining whether they are in correct form and whether there is a sufficient balance on the respective customers' accounts (or, alternatively, a standing arrangement for the necessary overdraft) to warrant their being paid. In the event of the customer's balance being insufficient, or if his account is already overdrawn to the maximum figure allowed, the cheques are referred to the manager, by whom they are either paid at his discretion, or returned direct to the presenting bank whose name appears in the "crossing" (see Chap. 14), stamped across the face of the cheque. The verified total of the cheques is acknowledged to Head Office in the daily London Letter previously mentioned, and is also entered to the *credit* of Head Office in the Head Office Account Book or "Daily State", and to the *debit* of Sundry Customers Accounts in a book described as the *Waste Book*, entered up by one of the clerks, or in some branches, in a *Scroll Cash Book*, which is entered up by the cashier. The form and functions of these books are more fully described below, but it may here be stated that their chief purpose is to act as books of original entry for the whole of each day's transactions at the branch.

The letters received from Head Office, customers, and other banks will be disposed of in various ways. Where necessary, special replies will be drafted or dictated by the manager or accountant, particularly in the case of letters from Head Office or letters from customers concerning their general business with the bank. Other letters will contain remittances from customers for the credit of their account, such as bank notes or treasury notes, or cheques upon other banks or of other customers of the branch concerned. Such remittances will be passed to the cashier, by whom they will be credited to the accounts of the

senders, and otherwise dealt with in the manner described hereafter.

In addition to such credits, debits of various kinds will be received, such as cheques sent in by customers with a request that cash in exchange be forwarded, or cheques remitted by other banks with a request that they be paid by credit through the respective Head Offices. In respect of all such items, acknowledgments or letters of advice as the case may be are forwarded to the customers.

### The Duties of the Cashier.

In the meantime the cashier (or cashiers) will have been arranging his cash for the business of the day, preparing his notes into neat little bundles and his coin into tidy piles for convenience of handling during a busy period. The cashier's duties are important not only because they are concerned with the handling of the whole of the cash at the branch, but also because he comes so closely into touch with the bank's customers, the majority of the transactions constituting the day's business passing through his hands. His work falls into two main divisions: (a) the receipt of cash, cheques, postal orders, etc., for the credit of the accounts of customers; and (b) the encashment of cheques, bills, postal orders, etc., for customers of the branch, or for customers of other branches of the same bank, or sometimes indeed for persons who are not even customers.

In larger branches the payment and receipt of cash is allocated to separate cashiers, who operate at the "paying" and "receiving" counters respectively.

### The Receipt of Credits.

Details of all credits handed in to the cashier are entered on a form described as a *Paying-in Slip*, which is usually attached to a counterfoil, and, with a number of other similar forms, makes up the *Paying-in Slip Book*, of which a specimen page appears overleaf, although the style of arrangement varies considerably as between the different banks.

As a rule the *Paying-in Slip* and its counterfoil are filled in by the customer, who hands it to the cashier with the cash and cheques specified thereon. The cashier carefully checks the items and examines the cheques to ensure that they are correctly endorsed and that they are otherwise in order (see Chapter 14), after which he initials and impresses with a date stamp both the credit slip and the counterfoil, and then, having torn off the slip, hands the slip book back to the customer, who thereby obtains an immediate receipt for his credit. In case any mistake should arise it is necessary that the *Paying-in Slip* should be correctly dated, and signed in the space provided at foot by the

person paying in the credit, a requirement which is of special importance when the credit is made out by the cashier on one of the loose forms kept for the purpose on the bank counter.

From the specimen credit slip, it will be noted that for convenience of entry in the branch records the totals of cash, cheques on other banks, cheques on the bank itself ("cheques on ourselves"), and all bills are specified separately; and it is, of course, important that each of these totals should be carefully verified by the cashier. He should also carefully scrutinise the cheques

### SPECIMEN FORM OF CREDIT SLIP

*It is particularly requested that the Person paying in fill up this Memorandum, which is to be returned to him initialed by the Cashier.*

**CREDIT James Brown** in A/C with The Northern Bank, Limited,

.....192..

THE NORTHERN BANK, LTD.			
.....192..			
Bank of England Notes	20	0	0
Country Notes	..	..	..
Currency Notes—£1	25	0	0
—10/-	0	10	0
Gold—Sovs. £	..	..	..
—Half Sovs. £	..	..	..
Silver, etc.	7	2	8
Total of Cheques	28	2	7
Total of Bills	..	..	..
<b>Total £</b>	<b>80</b>	<b>14</b>	<b>10</b>

Cheques on other Banks.	Cheques on Ourselves.	Bank of England Notes	Country Notes	Currency Notes—£1	—10/-	Gold—Sovs. £	—Half-Sovs. £	Silver, etc.	Total Cash
7	1	20	0	25	0	0	0	0	52
2	9	0	0	0	10	0	0	0	12
8	3	0	0	0	0	0	0	8	3
11	11	0	0	0	0	0	0	0	4
19	17	0	0	0	0	0	0	0	11
8	8	0	0	0	0	0	0	0	8
<b>8</b>	<b>11</b>	<b>19</b>	<b>17</b>	<b>8</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>10</b>
									<b>Total £</b>
									<b>80</b>
									<b>14</b>
									<b>10</b>

From

*James Brown.*

Signature of Person paying in, *James Brown.*

drawn on the branch, satisfying himself that they are correctly drawn, that the endorsements are in order, that the signatures are those of customers of the branch whose accounts will permit of the cheques being paid.

As a rule differently coloured slips are used for credits to current accounts, deposit accounts, and the accounts of customers at other branches or at other banks, such arrangements not only facilitating the work of the clerks at the branch responsible for the entries, but also ensuring that the credits are passed to their correct destinations.

All cash received by the cashier is carefully sorted into special receptacles used for the purpose. Bank of England notes are carefully scrutinised, those paid in by each customer being given a code reference number which is marked on the face of each note, so that if necessary it may be easily traced back to the person from whom it was received by the bank. Postal orders and money orders are similarly dealt with.

### Payments by the Cashier.

The other broad division of the cashier's duties consists in the encashment of cheques drawn on the accounts of customers

of the branch, and presented for exchange either by the customers themselves or by third parties, including other banks. Transactions of this kind require considerable care on the part of the cashier, for not only is it easy on a busy day to make mistakes in the amount paid out, but there is considerable risk, as we shall see later, of involving the bank in serious loss by the payment of a cheque bearing a forged or unauthorised signature of the drawer. Accordingly, the cashier should take every precaution to verify the signature on all cheques which he encashes, referring if necessary to the signature index kept by him for this purpose (see below). Before paying any cheque he must also ensure that the state of the customer's account will warrant the payment. After satisfying himself in these respects, the cashier *cancels* the signature by drawing his pen through it as an indication to other members of the staff that the cheque is to be regarded as paid.

If, as sometimes happens, the signature differs in form from the specimen in the bank's hands, or the cashier has reason to doubt its authenticity, the drawer's confirmation should be at once obtained if possible, otherwise the cheque should be returned to the presenter marked "Signature differs", or "Payment postponed pending drawer's confirmation". Cheques refused payment on technical grounds, as, for example, on account of an irregular endorsement, will be returned by the cashier with an answer to that effect. (See also Chapter 14.)

Payment of all cheques drawn on the branch must, of course, be made in legal tender currency, and so far as it is possible, every effort is made to meet the wishes of the customer in this respect. It is, in fact, an important duty of the cashier to keep sufficient supplies of silver and copper to satisfy the requirements of the customers of the branch, special arrangements being made, if necessary, to obtain periodical supplies of small change for the benefit of customers who require it for ordinary business purposes or for the payment of wages, salaries, etc. If bank notes are paid out, a record of the issue is carefully made in a Bank Note Register specially kept for the purpose, and ruled on the lines of the following specimen. It will be observed that this contains details of the numbers, dates, and other particulars of all Bank of England notes held by the branch, separate pages being devoted to notes of different denominations.

BANK NOTE REGISTER

(20 NOTES)

Date of Receipt.	Numbers.	Place of Issue.	Date of Notes.	To whom paid.	Date of Issue.	Cashier's Initials.
1st July, 19..	XT110731	London	1st Aug., '07	James Brown	30th July, 19..	} T.D.K. (213)
"	" 3	"	"	"	"	
"	" 3	"	"	"	"	

### The Cash Book.

It is obviously necessary that a careful record should be made by the cashier of each of his cash transactions as it is completed, and although the actual methods adopted may differ considerably, it is almost invariably arranged that all entries affecting his *cash* shall be made by the cashier himself, not only in order that he may satisfy himself as to the accuracy of records involving the cash under his care, but also because the entering up of items from a credit or debit voucher enables him to visualise the transaction and frequently to recall any mistake which may happen to have been made.

In the larger branches, where the counter work is usually very heavy, it is imperative that the clerical work of the cashiers should be reduced to a minimum, and accordingly a simple form of receipts and payments book is used, known as the *Counter Cash Book* or the *Tellers' Book*, in which are recorded against the names of the persons concerned the totals only of the cash paid or received by the cashier. The following is the ruling of such a book:—

#### COUNTER CASH BOOK

*Dr.* (Cash Received.)

DATE: 7TH JULY, 1926.

(Cash Paid.) *Cr.*

Name.	B. of E. Notes.	Total Cash Received.	Name.	B. of E. Notes.	Total Cash Paid.
Balance on hand	5635	17,906 14 9	A. Brown & Co.	30	75 19 11
J. Jones & Son	15	35 4 6	Incidental Exes.		5 0 0
Cashier No. 2	330	.. .. .			

It will be seen that this book records merely the cash and Bank of England notes passing to and from the hands of the cashier, and contains no entries relative to cheques, bills, or postal orders, details of which are recorded by a special clerk in the *Waste Book*, described hereafter. Hence, by completing all the entries in his Counter Cash Book, and by totalling up the two sides, the cashier can at once ascertain what should be the amount of cash in his hands at any moment during the day.

### The Scroll Cash Book.

In many branches the book of original entry kept by the cashier is much more elaborate in form, and contains several columns on both sides for details of all the items comprising credits paid in and for particulars of all accounts debited. In this *Scroll Cash Book*, as it is called, are usually included, either in detail or in total, entries of all the transactions of the branch,

whether they affect the cash or not. The Scroll Cash Book thus fulfils a similar function to the General Journal, which is maintained by many commercial firms, and in form is very similar to that of the Waste Book described in the following paragraph.

**The Waste Book.**

It will be appreciated that the entry of a detailed book of the nature of the Scroll Cash Book becomes a fairly difficult task during a busy period, and accordingly it is now usual in large branches for the details of all transactions, including those directly affecting the cash, to be recorded by a special clerk in a *Waste Book*, or, if there are several cashiers, in a separate *Waste Book* for each cashier. The form of the *Waste Book*, like that of the Scroll Cash Book, varies considerably as between one bank and another, but the aim in all cases is to obtain a clear and an adequately divided record of the whole of the transactions at the branch, so that the balancing of the totals of each separate class of items can be easily and quickly effected. The following is the ruling of a typical *Waste Book* used by one of the "Big Five" :—

**WASTE BOOK (London Ruling)**

CASHIER No. 1.

bal car ftd.	Current Account Credits.	No.	On Account of	Notes In.	Coin In.	Postal Orders.	Town Clearing.	Metro. Clearing.
0 0 0 0	84 15 6	C.A. D.R.	James Brown, . . . . . 1/1/7 William Jones Bill for Collection, No. 173, 2/1/7 Henry Thompson . . . . .	35 170	17 3 6 11 5 0 6 10 0	0 11 3	1 7 9	10 0 0

DATE, 1st July, 192...

lbs.	Country Clearing.	Scottish and Irish.	Sundries and Directs.	Gen. Ledger A/c Debits.	Current A/c Debits.	No.	On Account of	Notes Out.	Coin Out.
8 0	0 14 0			8 0 0	10 0 0 32 3 4	C.A. ...	S. Robinson—Self . William Brown . Incidents—Postages	35	10 0 0 17 3 4 3 0 0

**The Slip System.**

The method of recording transactions in the books of a banker is usually described as the Slip System, by reason of the fact that all entries are made from particulars given on sundry slips of paper known as "vouchers", including cheques, bills of

exchange, credit slips, debit slips, and forms of advice. All of these pass in the first instance through the hands of the cashier or through the hands of the Waste Book clerk, by whom they are sorted into various trays, or placed on different "spike" files, according to their nature. Thus all cheques drawn on accounts at the branch are placed in one receptacle or on one file—while separate receptacles or files are kept for such items as cheques on local banks, cheques on other banks in London and the country, branch credit slips and sundry items, as, for example, debits or credits on Head Office and other branches or banks.

Each group of vouchers must be separately dealt with, and in branches of any size the work is apportioned to separate clerks. Thus all cheques on the local banks are stamped with the branch crossing stamp—which includes the name of the bank and the address of the particular branch concerned, entered in the *Local Clearing Book*, and, after agreement of their total with that shown in the appropriate column in the Scroll Cash Book or Waste Book, are presented by the exchange clerks to the other banks for payment and credit through the respective Head Offices. Similarly, cheques on other branches and banks in London and the country are crossed with the branch stamp, and are entered on separate Clearing Sheets for transmission to Head Office in order that they may be presented for payment through the relative clearings (see *post*, Chapter 15). Town, Metropolitan, Country, Scotch and Irish, Walks, Head Office, and Branch cheques are separately listed, and their totals, after being agreed with the totals of the relative columns in the Waste Book, are brought to a *Remittance Summary Sheet*, the total of which is agreed with the grand total of all the remittance columns of the Scroll Cash Book or Waste Book.

### The Branch Ledger Accounts.

All cheques drawn by customers of the branch and all credits to the accounts of customers are collected by the clerks in charge of the branch ledgers, which contain the accounts of all the customers of the branch, and are usually divided into two main groups: (a) *Current Account Ledgers*, containing all the current and loan accounts, and (b) *Deposit Account Ledgers*, containing the deposit accounts. The Current Account ledgers usually consist of ponderous volumes divided alphabetically, thus, A-K, L-P, etc., but in some branches the accounts of customers are separately kept in small books, one for each customer. Deposit account ledgers are usually divided numerically, each deposit account being given a number for facilitating records and identification. Thus the accounts numbered 1-150, 151-300, etc., may be kept in different volumes. As a rule, the work of



making entries in the customers' accounts is sufficiently heavy to warrant the division of the ledgers among several clerks, each of whom is responsible for the accuracy, neatness, and daily completion of his own section. Accordingly each ledger clerk sorts out from the general pile received from the cashier only those vouchers relating to the accounts in his own section of the ledgers.

The work of entering up the branch ledgers proceeds throughout the day, each clerk as he receives his quantity of vouchers sorting them into alphabetical order and proceeding to make the necessary entries in the respective customers' accounts, the appearance of which is somewhat as follows :—

**SPECIMEN CURRENT ACCOUNT LEDGER RULING**

**JAMES BROWN, Tailor, 17 Valley Road, Northtown.**

(1½ per cent. interest : minimum balance £100.)

17/1/08. Mandate for Ada Brown, wife of James Brown, to sign "per pro."

Particulars.	Debits.	Credits.	Dr. or Cr.	Balance.	Days. <sup>1</sup>	Decimals on Dr. Balance.	Decimals on Cr. Balance.	Date Passbook Issued.	Clerk's Initials.
1 Balance		170 9 3	Cr.	170 9 3	1		170		
2 By Cash		30 1 0		300 3 3	3		600	2/1/19..	T. D. K.
3 Wilkins & Co.	57 1 9			143 1 6	5		713		
0 Self	28 0 0			118 1 6					

<sup>1</sup> i.e., since the last entry.

The reader who has some knowledge of book-keeping will notice that, whereas in the majority of ordinary business accounts the debit and credit items are recorded on opposite sides of the page, in a bank's ledgers both debit and credit items are recorded in chronological order on one side only. Furthermore, it will be noticed that the bank ledger account has a column for the daily extension of the balance standing to the debit or credit of the customer, together with sundry other columns for the calculation of interest on that balance. As a rule interest is calculated by the "decimal method", the balance outstanding on any date being multiplied by the number of days between that date and the date of the previous entry, the resulting product being extended into the appropriate column, which is totalled when the account is closed or at the quarterly or half-yearly balance, and the sum of the decimals converted by the use of special tables into f. s. d. The amount so obtained is then credited or debited as the case may be to the customer's account. The deposit account ledgers are somewhat similarly ruled, except, of course, that no columns are provided for decimals on *debtor* balances.

At the head of the account the ledger keeper writes the name of the customer, in bold lettering, with his occupation and full address, adding any special information relative to the conduct

of the account. Thus, in the case of overdrafts, a red-ink note will be placed for the guidance of the ledger keeper, specifying the limit to which the customer is allowed to overdraw, and giving the date upon which a report concerning the state of the account must be made to Head Office. Any special arrangements regarding the rate of interest to be charged or allowed are also indicated.

In the case of the accounts of limited companies, partnerships, friendly societies, public authorities, and other bodies, the full official title appears in the ledger heading, and a red-ink note is added for the guidance of the ledger keeper, giving the names of the officials and indicating how cheques and bills are to be signed on behalf of the company, association, or institution concerned. Similarly, in the case of joint accounts, trust accounts, or executors' accounts, a note is appended specifying the names of those who are to sign cheques upon the account. All such instructions are obtained from the customers at the time the accounts are opened, and it is, of course, the duty of the ledger keeper to ensure that all cheques are correctly drawn in accordance with these instructions or *mandates*, as they are called. (See *post*, Chapter 10.)

The ledger keeper is expected to be thoroughly acquainted with the signature of all the customers in his section of the books, and is largely relied upon to see that no cheques bearing forged signatures are passed to the accounts. He is also expected to see that the signatures on all cheques posted by him are properly cancelled, while he should direct the attention of the accountant or manager to any operations upon the accounts which may have an important bearing upon the customer's relations with the bank. It is scarcely necessary to point out that strict accuracy in making the entries is one of the foremost qualifications of a good ledger clerk, for mistakes in entering the amounts of cheques or credits, or in extending the daily balance, may occasion endless difficulty when the books are balanced at the end of the branch week.

The posting of deposit accounts is almost identical with that of current accounts, except that, as all deposit accounts have credit balances, there is less liability to error than in the case of current accounts, where some balances are in credit and others in debit. Apart from this, the system of consecutively numbering all deposit accounts is a safeguard against the entry of items to the credit or debit of the wrong customer.

### Opening New Accounts.

This important matter is dealt with in Chapter 9.

## The Bill Ledgers and Diaries.

Transactions relating to bills of exchange and promissory notes are recorded by each branch in special books kept for the purpose, including usually a Bills Discounted Register, a Bills for Collection Register, a Discount Ledger, and a Bill Diary.

*The Bills Discounted Register* contains full particulars of all bills discounted by the branch on behalf of its customers, the entries being made from the bills themselves and the total of each day's discounts being extended to a special column. As each bill is entered in this register, brief details are entered under the due date in the *Bill Diary*, which is inspected every day by the accountant or bill clerk to ensure that any bills falling due are despatched for presentment and collection. From the Bills Discounted Register the amount of each bill is subsequently posted to the debit of the customer's account in the *Bills Discounted Ledger*, which contains a separate account in the name of each customer for whom bills are discounted. Credits to this ledger arise when any of the bills are paid at maturity, or when any bills fall due but are unpaid, the entries being made from slips compiled by the accountant or bill clerk, which, after passing through the Scroll Cash Book or Waste Book, are posted to the discount ledger.

When bills discounted fall due but are unpaid they become what are described as *past due* bills, their amount being credited to Bills Discounted Account and debited to Past Due Bill Account in the General Ledger (see below), full particulars of the overdue bill being entered in the *Past Due Bill Register*. If possible, of course, the amount of a past due bill will be debited direct to the account of the customer who is liable for his signature thereon, but it sometimes happens that this cannot be done, and accordingly the amount is placed to Past Due Bill Account, where it remains until the bill is paid or the debt is wiped off as being irrecoverable.

Bills for collection are merely held by the bank for collection on behalf of its customers, but as the bank is liable for the prompt and correct presentation of such bills for payment when due, it safeguards itself by keeping careful entries thereof in its books. Thus full particulars of bills for collection appear in the *Bills for Collection Register*, the amount of each bill being entered under the due date in the Bill Diary. The daily total of bills for collection received by the branch, as ascertained from this Register by the cash-book clerk, is debited to Bills for Collection Account in the General Ledger through the General Cash Book (see below), and in order to maintain the double entry principle, a corresponding credit is placed to an account described as *Bills Receivable Account* in the same ledger. When the bill is sent for collection to Head Office or to another branch or agent and advice

of its payment is received, the Bills for Collection Account is credited and Head Office, the branch, or agent is debited; at the same time the amount is debited to Bills Receivable Account, thus adjusting this account, and the customer is credited. The total of all bills for collection on hand at the branch is thus indicated at any particular time by the credit balance on Bills for Collection Account, and the total of the latter can be verified at any time by extracting from the Bills for Collection Register the amounts of all bills which are not marked off in the appropriate column as having been paid.

### The Daily Balance.

Before the staff leaves the branch after the close of the day's business, it is necessary that all entries of the day's transactions in the books should be completed and balanced (so far as is possible), and that the total of the cash on hand should be carefully verified by the cashier as agreeing with that shown in his cash book. If the cashier is accurate and methodical the balancing of the cash becomes a straightforward matter which is easily accomplished, but it sometimes happens that a branch is afflicted with a careless and unmethodical cashier who is more frequently wrong than right, or at least imagines himself wrong on the majority of occasions.

So far as the cash itself is concerned, the balancing merely involves the counting and agreement of the cash on hand with the balance disclosed by the Counter Cash Book, but in addition it is necessary to agree with the totals of the relative columns of the Scroll Cash Book or Waste Book, the respective totals of the cheques on local banks, of the cheques on other branches and banks ("Remittances"), of the special debits and credits to branches and agents, and of the debits and credits to customers' accounts.

As already indicated, the Remittances are detailed on special clearing forms, and their total agreed with that given in the Waste Book, after which the total is entered to the debit of Head Office Account in the special book kept for the purpose. All local cheques remaining on hand at the close of business are entered in the Local Clearing Book and their total verified. Credits and debits to Head Office appear on the Head Office or London Letter of Advice, whence they are taken to the Head Office Account in the special book already referred to. To this account are also placed the totals of the debits and credits to branches and agents detailed on the appropriate sides of the *Head Office Daily Return or Transfer Sheet* (see specimen on page 83), from which sheet entries between the various branches or between the branches and other banks are made by the Head Office in the books kept for the purpose. This sheet is perforated

so that the various portions may be detached and passed to the appropriate sections of the Chief Accountant's Department for the necessary action.

Debits and credits to current accounts are entered in the *Day Book* or *Current Account Book*, which is divided into sections to correspond with the division of the ledgers, each section being separately entered and totalled, and all totals brought together in a final summary to agree with the day's totals of the respective columns in the *Waste Book* or *Scroll Cash Book*. Credits and debits to deposit accounts may be similarly entered, or they may be entered in the *Supplementary Cash Book* described below, but as a rule their totals cannot be *separately* agreed with *Waste Book* totals. Deposit Receipts (see Chap. 9) are entered in special books kept for the purpose, the totals of receipts issued and of receipts paid during the day being obtained by the summary of entries made in special registers kept for such records.

Finally, in what is really a special division of the *Day Book*, although it is sometimes described as a *Supplementary Cash Book*, are entered all items affecting other accounts of the branch not included in the books mentioned, as, for example, amounts of interest paid or charged during the day, incidental expenses, salaries, commissions paid or charged, etc., all of which affect accounts kept in the branch *General Ledger* (see below).

### The General or Clean Cash Book.

When all items are entered and the separate totals agreed where possible with the totals in the special columns of the *Waste Book*, the cash book clerk proceeds to balance the whole of the day's transactions by recording the individual totals of each class of transaction in the *General Cash Book* or *Clean Cash Book*, a typical form of which is illustrated on page 82.

Thus the total debits and credits to Head Office are taken from the *Head Office Book*, debits to Past Due Bills from the *Past Due Bill Book*, the total debits and credits to current accounts from the *Current Account Book* or *Day Book*, the total of the day's Incidental Charges from the *Incidental Charges Book*, the totals of debits and credits to other *General Ledger Accounts* from the *Supplementary Day Book*, or *Supplementary Cash Book*, and so on.

It will be observed that the *General Cash Book* includes the totals of the entries in all accounts at the branch, including cash, and the agreement of its two columns enables the clerk in charge to announce that the transactions for the day have balanced, and that every debit entry made in the books is balanced by the corresponding credit entry. It should, however, be understood that this agreement does not prove that entries are made in the correct accounts, and in order to ensure that this is

GENERAL OR CLEAN CASH BOOK

	Thursday,.....19		Friday,.....19		Saturday,.....19		Monday,.....19		Tuesday,.....19		Wednesday,.....19	
	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.	Cr.	Dr.
Head Office . . . . .												
Country Agents . . . . .												
Bills for Collection . . . . .												
Bills Receivable . . . . .												
Bills Discounted . . . . .												
Loan Bills and Promissory Notes . . . . .												
Past Due Bills . . . . .												
Current Accounts . . . . .												
Deposit ditto . . . . .												
Do. Receipts . . . . .												
Short Loans to Stockbrokers, . . . . .												
Accepted Bills . . . . .												
Do. do. Payable . . . . .												
Foreign Credits, Balts, etc., Granted . . . . .												
Do. do. Payable . . . . .												
Bank of England . . . . .												
Stamps . . . . .												
Bank Premises . . . . .												
Discount . . . . .												
Incidental Charges . . . . .												
Salaries . . . . .												
Interest No. 1 . . . . .												
Do. No. 2 . . . . .												
Do. No. 3 . . . . .												
Commission . . . . .												
Postages . . . . .												
Rent Received . . . . .												
<i>(All the foregoing entries must be posted to the respective General Ledger Accounts in which the Dr. &amp; Cr. sides are reversed.)</i>												
Daily Totals . . . . .												
Brought Forward . . . . .												
Cash Balance . . . . .												
<b>TOTALS</b> <i>(to be initialled each day by the responsible check officer).</i>												

\* (Dr. General Cash Account.) † (Cr. General Cash Account.)

**NORTHTOWN BRANCH.**

19\_\_

**AGENTS (NO. 1).** See instructions on other side.  
 Entries for Barclays, Lloyds, Midland, National Provincial, and Westminster Banks only on this portion.

Cr.	Particulars.	Agent.	Town.	Particulars.	Dr.
		Barclays			
		Lloyds.			
		Midland			
		National Provincial			
		Westminster			
<b>Totals forward to Agents No. 2.</b>					

**NORTHTOWN BRANCH.**

19\_\_

**AGENTS (NO. 2).** See instructions on other side.  
 Entries for other Agents.

Cr.	Particulars.	Agent.	Town.	Particulars.	Dr.
		Bank/L'pool			
		Commcl./Scot.			
		District Bank			
		Union of Manchr.			
<b>Totals forward from Agents No. 1.</b>					
<b>Final Agents' Totals to Summary.</b>					

**NORTHTOWN BRANCH.**

19\_\_

**BRANCH REMITTANCES.**

Cr.	Branch.	Dr.
<b>Totals to Summary</b>		

**NORTHTOWN BRANCH**

19\_\_

**H.O. TRANSFER ENTRIES.**

H.O. Clearing Cr.	H.O. Remittances Dr.
-------------------	----------------------

Also C.O. adjustments for Clearings and Remittances.

<b>Totals to Summary.</b>			

Total payments from London letter \$

**LONDON REMITTANCES.**

Total			
Deduct.			
C.G.			
Sch./Ir.			
		\$	

**NORTHTOWN BRANCH.**

19\_\_

**SUMMARY.**

**H.O. TRANSFER TOTALS.**

<b>CREDITS.</b>			
Agents (final total)			
Branch Remittances			
H.O. Clearing			
		\$	
<b>DEBITS.</b>			
Agents (final total)			
Branch Remittances			
H.O. Remittances			
		\$	

\_\_\_\_\_  
 Manager.

so, all entries in the ledgers are "called back" to the Day Book by two responsible officials, while entries affecting the General Ledger accounts are carefully ticked off by a responsible officer with the respective vouchers.

In some banks the General Cash Book here described is referred to as the Day Book, while the volume corresponding to the Day Book in the foregoing explanation is described as the *Check Ledger*. In any case students acquainted with book-keeping will recognise that the Day Books or Check Ledgers correspond to the *journals* or books of original entry used in ordinary commercial book-keeping, their object being to provide a check on all ledger entries, to subdivide the entries into different classes according to the accounts affected, and to provide separate totals of such classes for balancing purposes. It follows, therefore, that the subdivisions of the Day Book will correspond with the subdivisions of the ledgers, and accordingly when the balances of the latter are extracted at the weekly balance, the grand totals of the balances in each section of ledgers can be proved correct by comparing them with the grand totals obtained from the corresponding Day Book.

### The General Ledger.

The daily totals of the entries in each class of account are posted from the General Cash Book to the respective accounts in the General Ledger, which is usually kept by one of the senior-officials at the branch. Thus the totals of the debit and credit entries to the current accounts are entered in the General Ledger account headed "Current Accounts", those relating to deposit accounts to the account headed "Deposit Accounts", and so on. On the day that the ordinary ledgers are balanced, the balances of the accounts in the General Ledger are also taken out into the *Weekly Abstract Book*, and if the book-keeping at the branch has been accurately effected, every debit entry having been balanced by a corresponding credit, then the total of the debit balances in the General Ledger should equal the total of the credit balances.

Generally speaking, the extraction of the totals of the deposit account ledgers and of the deposit receipts ledger would involve too much work to permit of its accomplishment every week, and it is, therefore, usual to do this once a month in order that the total of the outstanding balances in these books may be agreed with the balance in the relative general ledger accounts.

In most branches it is not a difficult task to agree the balances of the general ledger accounts headed Bills Discounted, Bills for Collection and Past Due Bills with the balances shown by the Bills Discounted Ledger, the Bills for Collection Register, and the Past Due Bill Register, and accordingly, these items are



balanced from time to time at the accountant's discretion, but at least once in every month.

It will thus be seen that there is a very effective check upon the balances of all the accounts in the General Ledger, and, at the same time, the periodical balancing which takes place ensures that the whole of the accounts at the branch are accurately kept and that their balances are correct.

When the General Ledger is balanced, a statement of the entries therein, comprising all outstanding balances in the branch books, is compiled and forwarded to Head Office. Such a statement is usually described as the *Weekly Abstract*, a typical specimen thereof being reproduced on page 86.

It will be observed that it is drawn up in balance-sheet form, but, unlike a balance sheet, it contains the balances of the *nominal*—or profit and expense—accounts in addition to the balances of assets and liabilities. The branch assets consist of debit balances, such as those of cash, advances, and the balance of Premises Account, while its liabilities are principally the credit balances of its Deposit Accounts and Current Accounts. It rarely happens, however, that the total of the branch liabilities exactly equals the total of its assets, and the difference, if any, will appear as the balance of the Head Office Account in the General Ledger. Thus, if the branch is located in a wealthy residential locality, it is likely that its deposit and credit current account balances will be considerably in excess of its advances, in which case there will no doubt be a considerable amount to the debit of the Head Office Account, i.e., the branch may be regarded as loaning that sum to its Head Office. The reverse will be the case if the advances made by the branch are in excess of its total credit balances.

The correctness of the items in the Abstract is authenticated by the signatures of the branch manager, accountant, and cashier, for the figures therein form the basis of entries in the Head Office books, from which is thereafter extracted for submission to the general managers and directors a weekly or monthly statement giving the figures for the organisation as a whole.

The *Weekly Abstract* is usually accompanied by a return known as the branch *Weekly State*, a specimen of which is given on page 87. This form embodies a statement of the daily entries in the account between the branch and the Head Office, being, in fact, a reproduction of the Head Office account maintained at the branch. The items herein form the basis of entries in the *branch* account in the Head Office books, their accuracy being certified by the signatures of the branch manager and accountant on the reverse side of the form.

It is not possible within the limits of this chapter to describe adequately the actual method by which the balancing of the General Ledger is ensured, but it may be stated that this book is conducted on the self-balancing principle, the weekly totals

# THE NORTHERN BANK LIMITED

Northtown Branch.

## ABSTRACT BALANCE, No.

For the week ending \_\_\_\_\_ 19..

DEBITORS to the BRANCH.			
Head Office . . . . .			
Country Agents . . . . .			
Bills Receivable . . . . .			
* Bills Discounted . . . . .			
Loan Bills and Promissory Notes . . . . .			
Past Due Bills . . . . .			
Current Accounts Overdrawn . . . . .			
Short Loans to Stockbrokers . . . . .			
Accepted Bills Payable Account . . . . .			
Foreign Credits, Bills, etc., Payable Account . . . . .			
Bank of England . . . . .			
Stamp Account . . . . .			
Bank Premises . . . . .			
Cash on hand as specified below . . . . .			
<b>ASSETS.....</b>			
Incidental Charges . . . . .			
Salaries . . . . .			
Interest A/c. No. 1—On Dept. Repts. & a/cs. . . . .			
do. No. 2—Paid on Curr. a/cs. . . . .			
do. No. 3—Recd. on Curr. a/cs. & P.D. Bills . . . . .			
Rent Received Account . . . . .			
* (Including Foreign Bills Discounted £ : : ) . . . . .			£
<i>Manager.</i>			

CREDITORS of the BRANCH.			
Head Office . . . . .			
Bills for Collection . . . . .			
Current Accounts Creditor . . . . .			
Deposit Accounts . . . . .			
Deposit Receipts . . . . .			
Accepted Bills Account . . . . .			
Foreign Credits, Bills, etc., Granted . . . . .			
(Turnover—Current Week . . . . . £ )			
<b>LIABILITIES.....</b>			
Discount Account . . . . .			
Interest A/c. No. 1—On Dept. Repts. & a/cs. . . . .			
do. No. 3—Recd. on Curr. a/cs. & P.D. Bills . . . . .			
Commission Account . . . . .			
Postages Account . . . . .			
Rent Received Account . . . . .			
<b>Accountant.</b>			£

### PARTICULARS OF THE GENERAL BALANCE OF CASH ON HAND.

Specie—Gold . . . . .			
Silver . . . . .			
Copper . . . . .			
Notes—Bank of England . . . . .			
Treasury £1 . . . . .			
do. 10/- . . . . .			
Cheques on other Local Banks . . . . .			
Postal Orders . . . . .			
Stamps . . . . .			
Proportion of Cash to Deposits £ : : %			

### DAILY STATEMENT OF SHORTS AND OVERS IN THE CASH, HOWEVER SMALL.

If the Cash be correct, state so daily.

	OVER.	SHORT.
Thursday . . . . .		
Friday . . . . .		
Saturday . . . . .		
Monday . . . . .		
Tuesday . . . . .		
Wednesday . . . . .		
Total . . . . .		

Certified \_\_\_\_\_ Cashier.

BRANCH WEEKLY STATEMENT TO HEAD OFFICE  
THE NORTHERN BANK LIMITED

NORTHTOWN BRANCH

State No. 11/26

For Week ending \_\_\_\_\_ 192

I certify that the daily transactions at this Branch for the week ending \_\_\_\_\_ 192  
have been checked in accordance with the instructions contained in the Book of Instructions and particularly in paragraphs  
.. inclusive; that all calculations have been carefully made and in conformity with the Rules of the Bank; and that  
Impersonal Accounts have been checked to date in accordance with instructions.

\_\_\_\_\_  
Manager.

\_\_\_\_\_  
Accountant.

I certify that I counted the Cash amounting to \_\_\_\_\_  
on \_\_\_\_\_ and found it correct, and to consist of no  
notes than those allowed by paragraph .. of the Book of Instructions.

\_\_\_\_\_  
{ Manager  
or  
Accountant.

STATEMENT OF BLANK FORMS ON HAND

	Manager's Drafts on Head Office Stamped.	Foreign Drafts.		Letters of Credit on Branches and Agents.	Deposit Receipts.	Post Office Receipts.
		F	E			
and last week ..	.....	.....	.....	.....	.....	.....
received from Head Office ..	.....	.....	.....	.....	.....	.....
OTAL .. ..	.....	.....	.....	.....	.....	.....
during the week ..	.....	.....	.....	.....	.....	.....
held during the week ..	.....	.....	.....	.....	.....	.....
being on hand .. ..	.....	.....	.....	.....	.....	.....

We hereby certify that the above Statement is correct.

\_\_\_\_\_  
Manager.

\_\_\_\_\_  
Accountant.

(Reverse Side)

Norhtown Branch.

HEAD OFFICE.	THURSDAY.	FRIDAY.	SATURDAY.	MONDAY.	TUESDAY.	WEDNESDAY.
Notes .. ..						
Orders .. ..						
Total (£ : : )						
Remitted .. ..						
Office Advances .. ..						
Notes .. ..						
Total (£ : : )						

at the foot of the General Cash Book (see page 82) being posted to an account in the General Ledger termed the *General Cash Account*, but on *opposite sides* to all other entries made in the General Ledger from the General Cash Book. Thus, this account contains the totals of all transactions effected at the branch from day to day and throughout the half-year, and its balance at any time is, of course, that of the cash on hand at the branch.

## CHAPTER 6

### THE BANKER AND THE CURRENCY

IN an earlier chapter we have stated that a banker is essentially "a dealer in money and credit". He receives money from some customers, and undertakes to pay it out to them or to third parties when required to do so; from his depositors he *accepts* credit in order to *give* credit in the form of advances and loans; in discounting a bill he takes a "credit instrument" in exchange for money which he pays out, or in exchange for a credit which he places to his customer's current account, and, finally, as we have seen in discussing the utility of banking to the modern community, the banker performs services of the utmost value in controlling and regulating the currency and in providing supplies of "change" wherever it may be required. Moreover, it has been pointed out that in accepting deposits from his customers the banker undertakes to repay the amount in "legal tender" upon demand; in fact, the foundation of every one of the vast number of transactions "on credit" which form part of the daily life of the modern community is the frequently unwritten and often unexpressed obligation of the debtor to repay his creditor in legal tender currency.

It is, therefore, imperative that the practical banker should not only be thoroughly acquainted with the precise functions and attributes of the various forms of money, currency, credit instruments, and legal tender which pass through his hands in the course of his business, but also that he should have accurate and up-to-date knowledge of the law and recognised practice governing the use of such instruments of exchange in his own country, and in certain other countries with which he has business dealings.

#### What is Money?

The desire or the need to exchange one article or commodity for another existed even among the most primitive peoples, such wants being satisfied, in the absence of a resort to sheer force of arms, by a method of more or less peaceful negotiation described as *barter*, involving the direct transfer by one man of something which he possessed in exchange for something of which he stood, or thought he stood, in greater need. Thus a number of sheep would be bartered in exchange for a cow, or a number of days'

work upon the land given in exchange for a number of bushels of corn, and so on. Clearly such a system, or rather lack of system, necessitates the satisfaction of both parties to the bargain, apart from the fact that one man must need what the other has to give, and that the former shall give what the latter happens to want. Even under the simplest conditions such methods were troublesome and inexact, and as the number of commodities and services increased with the march of civilisation, it is not surprising that the difficulty and loss of time involved in thus seeking "a double coincidence of wants and of possessions" made barter quite impracticable.

Accordingly, in very early times men were led to fix upon some intermediate commodity, easily recognisable and transportable from one person to another, which would always be accepted in exchange for goods and services, and which would form a basis for the measurement and comparison of the values of all other commodities. This medium is called "*money*", and is usually defined as "*a commodity chosen by common consent to be a measure of value and a means of exchange between all other commodities*". A somewhat wider definition is that given by Mr D. H. Robertson, to the effect that "money is anything which is widely accepted in payment for goods, or in discharge of other kinds of business obligation".<sup>1</sup> There is, in fact, no real agreement at the present time as to exactly what is to be understood by the term "money", but it is clear from these definitions that it does not matter what the commodity is so long as it is universally accepted within the community in exchange for goods and services, and so long as it is received without question in final settlement of debts.

Thus we find that a surprising range of things have been used as money in different parts of the world and at different periods in the world's history, as, for example, oxen in ancient Greece, cowrie shells on the African Coast, sugar and tobacco in the West Indies, even in the seventeenth and eighteenth centuries, skins in the Arctic regions, and bricks of tea, used to this day in the mountainous wilds of Tibet. But while each of these media may have satisfactorily fulfilled the money-purpose for which it was intended, all were subject to various disadvantages which rendered them entirely unsuited to the needs of progressive peoples, and accordingly civilised communities throughout the world have resorted to the use of money composed of specially designed pieces of metal known as *coins*. From time to time, iron, copper, tin, nickel, gold, and silver, either alone or in combination as alloys, have been used in this way, but of all commodities which have been adopted as money, gold and silver—"the precious metals"—stand pre-eminent, and now form the basis of the currencies of most countries of the world.

<sup>1</sup> *Money*, page 3.

### The Functions of Money.

The idea underlying all the forms of money to which we have referred is that they shall perform the fundamental function of a *medium of exchange*. This implies that they can be used, either now or in the future, to command the labour or the products of the labour of others, and that they will be accepted as such by any member of the community, thus enabling the holder to satisfy his wants immediately or at any time without the inconvenience of barter.

The use of money divides exchange into two processes: we do not obtain money for its own sake, but in order to use it in purchasing other commodities for the satisfaction of our wants. Even under a money economy, the ultimate transfer is one of goods against goods (or services against services), but the transfer is *indirect* and is thereby rendered more simple.

Secondly, the commodity used as money must be such that the value of other commodities and services can be measured by reference to the standard; in other words, it must act as a *measure of value*.

One of the great defects of barter was the want of a common measure of value: as there was no third commodity in terms of which the values of all other commodities could be expressed, each transaction involved a distinct process of estimation, and even then the result arrived at could only be of the roughest kind. To act as a common denominator in the expression of values is to-day the most important of the functions of a money material. To a large extent, as commercial confidence has increased, men have ceased to use gold as a medium of exchange; but this does not imply a return to barter in the old sense, because gold remains the measure or standard of value, i.e., we still enjoy the essential advantages of a money economy.

Sheep, tea, skins, or oxen could perform the two foregoing functions more or less satisfactorily, but by reason of their perishable nature they cannot act as a good *store of value*, the third function demanded by the modern community of the money material upon which its monetary system is based. The commodity chosen should be one which does not deteriorate appreciably with time, otherwise the holder will suffer loss if he retains it for a long period with the object of exchanging it to satisfy his wants at his own future convenience.

Finally, modern civilisation, with its extensive system of loaning and dealing on credit, demands that its money material shall be a satisfactory *standard of deferred payments*. A lender who advances money now must be assured that, on the future date of repayment, the money he receives will exchange for approximately the same quantity of goods as it would on the date when he made the loan. Consequently, some commodity must be chosen as money which is reasonably stable in value

over a period of years, which implies that it must not be subject to violent changes in demand or in supply. This requirement is of particular importance in a community with a highly developed system of credit, if the relationship between debtors and creditors is to be equitably and reasonably maintained, for a rise in the value of money benefits creditors at the expense of debtors, while a fall has the reverse effect.

### The Characteristics of a Good Money Material.

The almost universal adoption of gold and silver as money is due to the fact that they possess in a greater degree than any other commodities certain characteristics or qualities which are necessary if the foregoing functions are to be satisfactorily performed. First among these is the property of *acceptability*. A good money material must be generally acceptable. There must exist no reason because of which people would prefer not to receive it or not to hold it, and from this point of view it will be appreciated that the ornamental attractiveness of gold and silver is in itself an advantage. Acceptability implies, too, that the material used shall be instantly *recognisable* and distinguishable from all other materials by the eye, ear, and the touch, so that counterfeiting is rendered difficult and loss to innocent persons is minimised.

Again, the material must be *durable*, so that it will not deteriorate quickly either from natural causes or as a result of wear and tear. Durability is clearly essential if the money is to last for any reasonable period, and if it is to be capable of transport from place to place. The commodity chosen must also have the characteristic of *portability*, i.e., it must be capable of being carried from place to place without difficulty or great expense, so that it can be transferred whenever it is required and be easily hidden if necessary.

In addition to the above, there must exist what are described as the "mechanical" properties of the money commodity, comprising the characteristics of *homogeneity*, *divisibility*, and *malleability*, all of which are possessed by the precious metals in a very high degree. Thus gold and silver are both capable of easy division, they can be brought up to a high degree of purity and consistency, while their great malleability permits of their being easily impressed with intricate designs. The final attribute is that of *stability of value*, which implies that the material used as money shall not be subject to violent changes in supply or demand. There must be a reasonable certainty that persons entering into future contracts shall give or receive value not more or less than that ruling at the time the contract is made, a criterion which is of vital importance in modern conditions, when so many agreements are entered into which involve the giving of credit and the deferring of payment for considerable periods.



Gold possesses this quality of steadiness of value in an eminent degree, chiefly because its annual supply is very small relative to the total amount in existence; but the same cannot be said of silver, the value of which has fluctuated very considerably in recent years, mainly on account of the opening up of rich mines in various parts of the world. For this reason most countries have adopted gold as the sole standard of value, and employ subsidiary coins of silver and copper for smaller payments.

### Coins and Coinage.

It is a far cry from the perfection of design and purity of the British sovereign to the rough pieces of metal which comprised the earliest forms of metallic money, passing current by weight and being marked or punched in various ways by different dealers to indicate their weight, and later on, their purity. This practice exists even to-day in China, where the variable weight of silver known as the *sycee* is used for payments and is impressed with the "Chop" or stamp of the native dealer in token of its purity and weight.

In most progressive states, however, the experience of centuries has made it abundantly clear that the issue and care of the coinage must be regarded as being essentially a government function of the first importance, demanding unremitting attention if the public is to be adequately safeguarded against fraud and the dangers of currency debasement. Accordingly, the manufacture and issue of coins is in most countries now subject to strict legal control, their size, weight, and standard of purity being rigidly defined by the legislature. Furthermore, as a protection against the fraudulent practices of "clipping" and "sweating", the edges of the coins are milled and the two surfaces are impressed with intricate designs, which include an indication of the face value and bear the name of the issuing state as a guarantee of genuineness.

While most modern states have reason to pride themselves upon the purity of their national coins, it has been found by experience that the wearing qualities of pure gold and silver are improved by the addition of a small proportion of a lower-grade metal, such as nickel, copper, or tin, in order to form what is known as an *alloy*. The Mint Regulations embodied in the statutes controlling the coinage therefore specify the *fineness*, i.e., the proportion of standard metal to base metal, which must be maintained in the alloy from which the coins are made. Thus the British sovereign is required to be eleven-twelfths fine, i.e., it must contain eleven parts of pure gold to every one part of alloy, while the gold coins of most other countries are 900 or nine-tenths fine, i.e., they contain nine parts of pure gold to every one part of alloy. Even with the most modern appliances, however, absolute accuracy is difficult to attain, and accordingly

a slight variation, known as a *remedy allowance*, is permitted from the legally fixed ratio.

### Mintage and Seigniorage.

As a rule the coinage of the standard metal in most countries is both *gratuitous*, i.e., free of any charge for minting, and *free*, i.e., any amount of the metal will be accepted from the public by the Mint for coinage at a price which is fixed by law. In our own country all gold for coinage is passed to the Mint through the Bank of England, but the whole of the gold so passed must be returned to the Bank in the form of sovereigns, none being kept back to cover the cost of making the coins.

In some countries, however, a charge known as *mintage* or *brassage* is made to cover the cost of converting bullion into coin, the charge being levied by inserting in the coins a certain proportion of alloy instead of the precious metal, or by exacting a direct charge for the convenience of minting from the person leaving the bullion for coinage. In past times governments went even further than this, and extracted more precious metal than was needed to cover the cost of minting, retaining the excess as a profit, known as *seigneurage* or *seigniorage*, by reason of the fact that it usually accrued to the reigning monarch.

### Legal Tender Coins and Token Coins.

In addition to providing for the minting and issue of the coinage, the government also takes steps to obviate all difficulty and to ensure that its issues shall circulate freely by decreeing that one or more coins of the standard metal shall be the standard of value and *unlimited legal tender*, i.e., *that it must be accepted by a creditor up to any amount when offered in final discharge of debts or in full payment for commodities*. This means that a creditor who refused to accept a payment properly offered to him in legal tender would be placed in a difficult position, and thus the provision is easily effective in ensuring the acceptance of the coins throughout the community. As a rule, only one metal, and that usually gold, is chosen as the standard and made full legal tender, i.e., most countries have instituted what is known as the *mono-metallic* system, although a number of countries have established a *bi-metallic* system, under which both gold and silver are adopted as standard metals, being accorded equal coinage facilities and made legal tender for payment of any amount. In our own country the gold sovereign is the standard of value and the unit of account; it is legal tender for payment of any amount, and is the foundation not only of our currency system but also of that vast superstructure of credit to which we have previously referred.

It will be readily appreciated, however, that the high value of gold makes impracticable its use for payments of small amount, and accordingly coins of low denomination in a cheaper metal are issued for this purpose. Such coins, issued as subdivisions of the standard coin, are known as *tokens* or *token coins*, since their face value is greater than the value of the material from which they are made. Thus in Britain the gold sovereign is supplemented by silver coins of various denominations, and also by bronze pennies and half-pennies. But the silver bullion in twenty-shilling pieces, or the bronze in 240 pennies, can be purchased on the bullion or metal market for considerably less than £1, with the result that the Government in normal circumstances makes a handsome profit or seigniorage upon the issue of such token money.

Token coins are therefore convenient subdivisions of the more valuable standard coin, and are maintained in circulation because (a) only sufficient are issued to satisfy the requirements of the community for making small payments; (b) they are more valuable as coins than they are as bullion, and (c) they are made *limited legal tender*, i.e., legal tender for payment of small amounts only. For example, silver coins in this country are legal tender for all payments not exceeding £2, while bronze coins are legal tender for payments not exceeding one shilling.

### Paper Money.

In the foregoing paragraphs we have confined our attention primarily to money which exists in the form of coins, but no doubt every reader is acquainted with the fact that in this and other countries the greater proportion of the circulating media consists of paper "promises to pay" of various kinds, as, for example, the British Treasury note and the Bank of England note. Notes of this kind which circulate without difficulty are clearly within the second definition of money which we have previously quoted, for they pass freely from hand to hand in payment for goods, and are generally accepted in discharge of obligations. They are, in fact, correctly described as *paper money*, being usually issued by the state, or, as in England, Scotland, Ireland, and many other countries, by the state as well as by private banking institutions, subject to legal control.

As we have seen in tracing the origin and development of the bank note, the general circulation of bank notes was ensured, in the first place, by the fact that they were merely a convenient substitute for the metallic currency which was held in reserve against them, and convertible at any time upon demand into the standard of value. Notes of this kind are described as *convertible paper money*, and they may be regarded in effect as representative of the valuable metallic currency which they displace from circulation. By their use wastage of gold through wear

and tear is obviated, while there is a saving of the expense and loss which are necessarily incurred in remitting gold coins.

It is now common knowledge, however, that in the majority of countries at the present time there exist vast issues of notes so far in excess of the reserves of gold and silver held against them that they cannot be regarded in any sense as convertible. During and since the War the amount of notes issued in some countries has been greatly in excess of the requirements of trade and exchange, and while they have been maintained in circulation by virtue of their being made legal tender by the government, they cannot be regarded as adequately fulfilling the functions which we have discussed in earlier paragraphs.

When strict convertibility is maintained (in practice as well as in theory) the greatest danger in the use of paper money—that of over-issue—is automatically removed, but even an inconvertible paper currency may function satisfactorily provided that the issue is carefully regulated in accordance with trade requirements. Up to the present, however—and this is one of the great lessons of the experiences of the last twelve years—governments have not shown themselves competent to manage successfully an inconvertible paper currency. Doubtless, the failure is usually due to the powerful temptations to over-issue arising out of exceptional conditions, but even in “normal” times it seems safer to rely on the automatic check of convertibility rather than on the uncertain influence of government control.

It may be added that paper money is in effect only a special form of token money, i.e., “money whose value is materially greater than the value of the stuff of which it is composed”,<sup>1</sup> but such money differs from the usual run of token money in the fact that it is frequently made legal tender for the payment of any amount, and in this respect is placed on a par with the standard currency which it represents. Thus, in our own country, the Bank of England note is legal tender for all payments above £5, while the treasury note is legal tender up to any amount, so that both are as useful for all practical purposes as the coined sovereign.

### Bank Money and Credit Money.

Mr Hartley Withers<sup>2</sup> comments on the enormous expansion of trade which followed the discovery “that gold could be economised by the use of paper which represented and multiplied it, and when confidence in a banker became sufficiently established to induce the community to circulate his promises to pay instead of pieces of metal”. But this expansion was slight compared with that which followed the widespread adoption of the bill of exchange as a medium of payment and the institution

<sup>1</sup> D. H. Robertson, *Money*, page 46.

<sup>2</sup> *Meaning of Money*, page 23.

of the cheque system with its vast saving of metallic and paper money.

The cheque and the bill of exchange belong to an extensive class of instruments by the use of which credit is given and taken, and payments are made between man and man without the use of legal tender money. So important have these instruments become that their form and the principles governing their issue are clearly defined by law.

Thus the Bills of Exchange Act, 1882, Section 3, defines a bill of exchange in the following terms :—

3. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.

The following is a specimen of a simple form of bill of exchange which complies with the requirements of this definition :—

£100 : 0 : 0d.

LONDON, 1st September, 19..



On demand, pay to Mr James Brown or Order  
the sum of One hundred pounds for value  
received.

THOMAS ROBINSON.

TO MR A. WALKER,  
70, South John Street,  
Liverpool.

The same Act defines a cheque as "A bill of exchange drawn on a banker payable on demand", and the following is a specimen of the form most commonly used in this country :—

No. 792630.

NORTHTOWN, 1st September, 19..

THE NORTHERN BANK, LIMITED,  
Northtown.

Pay Mr James Brown \_\_\_\_\_ or Order  
One hundred pounds \_\_\_\_\_



£100 : 0 : 0d.

THOMAS ROBINSON.

In both cases Thomas Robinson is the *drawer* of the instrument, while James Brown is the *payee*, i.e., the person to whom the money is to be paid. In the case of the bill, A. Walker is the *drawee*, i.e., the person upon whom the instrument is drawn,

and who is required to pay the money. The drawee in the case of the cheque is the Northern Bank, Limited. The exact legal relationship of these parties will be discussed in a later chapter, but it will be noted that both the bill and the cheque are orders for the payment of money drawn by one person on another or others, and they both in fact belong to that most important but limited class of documents known to the law merchant as *negotiable instruments*. But for the evolution of this class of instrument, it is difficult to see how commerce could ever have reached its present huge dimensions. "A Negotiable Instrument is a document containing a contract, to the ownership of which document are attached all rights under the contract. Whoever is in *bona fide* possession of such a document is presumed to be the lawful owner of it, and therefore entitled to enforce all rights under the contract. The document, and with it all rights under it, is transferred either by mere delivery or by delivery accompanied by indorsement. And the person who in good faith takes it, takes it free from any rights which might be enforced against the person from whom he takes it, and free from any defect in the title of such person".<sup>1</sup>

Both the bill and the cheque are also known as *credit documents*, or instruments of credit, and pass freely from hand to hand in the modern community in payment for commodities and in settlement of business transactions. They may therefore be regarded as money in the wider sense of the term, for they fall within the scope of the second definition which we have previously given. In order, however, to distinguish them from the more usual media of exchange, it is usual to describe bills of exchange and cheques as *credit money*, while the cheque itself is also frequently referred to as *bank money*. Some economists even go so far as to include in the latter term the whole of the funds left with the banker on current account, for "in essence a deposit which is not being drawn against is idling bank money, just as the shilling in my pocket is idling common money: and the passage of a cheque is a kind of transitory manifestation of bank money, as the passage of a Bradbury note is a transitory manifestation of common money. . . . We may thus think of the deposit as a kind of generating station or mother-ship for cheques".<sup>2</sup>

It is not altogether easy to regard the funds on deposit at a bank in the same light as we regard gold sovereigns or British treasury notes, but the fact remains that in our own country at any rate the vast proportion of commercial settlements are effected by the use of the cheque and the bill of exchange. In fact, it has been estimated that as much as 99 per cent. of wholesale payments are made in this way, with a consequent enormous saving in the use of legal tender currency. On the other hand,

<sup>1</sup> Disney, *Elements of Commercial Law*, page 126.

<sup>2</sup> D. H. Robertson, *Money*, page 49.

it must always be remembered that cheques and bills are taken in payment because the receiver is reasonably certain that he can convert them at his option into legal tender currency, and so we find that if there is any doubt upon this point such instruments are not usually accepted, and a demand is made for payment in coin or notes. For this reason, cheques and bills tend to circulate as money only to a limited extent and between persons who have confidence in the fact that they are good for their face value. It is not unusual, therefore, to regard such credit instruments and also bank notes merely as convenient representatives of metallic money, into which they can, if necessary, be converted at will.

### Money and Currency.

From the foregoing explanation it will be clear that *money* in the wider sense of the term includes all forms of legal tender money, and also such instruments of exchange as cheques and bills. As has been pointed out, however, there is no general agreement as to the precise use and significance of the term, and this statement also applies to the term "currency", which, although frequently applied to include the whole of the circulating media within a country, is more correctly confined to those forms of money issued or rigidly controlled by the state, and regarded as the current medium of exchange by virtue of the government authority behind them.

## THE BRITISH MONETARY SYSTEM

During the eighteenth century and until 1816, Britain had a bimetallic currency system, under which silver and gold were freely coined on an equal basis, and were legal tender for all payments at a certain fixed ratio. The system was not a success, however, and constant difficulties with the currency led the Government in 1816 to discontinue the free coinage of silver and to adopt gold as the sole standard of value, the sovereign and half-sovereign being made legal tender for payments of any amount. The coinage is now regulated by the Coinage Act of 1891, as modified by the Coinage Act of 1920, the present currency system being as described in the following paragraphs.

### British Metallic Currency.

Gold coins, consisting of sovereigns and half-sovereigns, are legal tender for payment of any amount. A sovereign consists of 123.27447 grains of standard gold, eleven-twelfths or 22 (out of 24) carats fine, and is legal tender so long as it does not weigh less than 122.5 grains. A half-sovereign is exactly half the

weight of a sovereign, but its minimum legal weight is 61.1250 grains.

In normal times the Mint accepts gold for coinage at the rate of £3, 17s. 10½d. per ounce standard, provided that it is of the required fineness and of sufficiently large quantity, but at the present time, by virtue of the provisions of the Gold Standard Act, 1925, all gold has to pass to the Mint through the Bank of England, by which gold is purchasable at the rate of £3, 17s. 9d. per ounce standard.

The difference of 1½d. per ounce between the Mint and Bank prices is not profit; it is a margin intended merely to cover the expenses and loss of interest involved in passing gold through the Mint for coinage. The Bank pays over gold coins in exchange for bullion immediately, or gives immediate credit for the gold in account, and it must accordingly be recompensed for the expense and loss of interest involved in having the bullion converted into sovereigns.

Silver coins, consisting of crowns, four-shilling pieces, half-crowns, florins, shillings, sixpences, and threepenny pieces, are legal tender for payments up to 40s. only. Those at present in circulation are of two kinds: (a) *The old silver coins* issued under the Coinage Act, 1891, which decreed that five shillings and one sixpence were to be coined from one ounce of silver,  $\frac{3}{16}$ ths or 925 (out of 1000) fine. As the price of an ounce of silver was generally about 2s. 6d., the Mint in normal circumstances made a handsome profit, or "seigniorage", on the coinage of silver. (b) *The new silver nickel currency*, issued under the Coinage Act, 1920. These coins are only 500 (out of 1000) fine, being composed of an alloy of silver and nickel. The decreased proportion of silver was necessitated by the great rise in the price of the metal during and after the war period, consequent on the widespread shortage which resulted from the greatly increased demand for the metal for currency purposes and the withdrawal of coins for melting and export.

Bronze coins, consisting of pennies, half-pennies, and farthings, are composed of an alloy of copper, nickel, and tin. They are legal tender for payments up to 1s. only.

### British Paper Currency.

*Bank of England notes*, of £5 and multiples thereof, are issued by the Bank of England in London, and by its various branches in Manchester, Birmingham, Bristol, etc. By the Bank of England Act, 1833, the notes were made legal tender for payment of all amounts *above* £5, except by the Bank itself or its branches. They are not legal tender in Scotland and Ireland.

These notes are now convertible into gold bullion, and are really in the nature of bullion certificates by virtue of the large metallic reserve held against them. The Bank of England has



now a monopoly of bank note issue in England and Wales, and, as we have seen, is required to make and publish a weekly return of the position of its Issue Department. (See *ante*, page 47.)

*Treasury notes* for £1 and 10s. are issued by the Treasury under the Currency and Bank Notes Act, 1914, which made these notes legal tender for payment of any amount. The notes are issued through the Bank of England, and are secured by a fluctuating proportion of silver coin<sup>1</sup> and of Bank of England notes, the remainder of the backing being government securities. A weekly return is issued showing the amount of notes outstanding and giving details of the position of the redemption account.

The following is a specimen :—

## CURRENCY NOTES ACCOUNT,

28TH APRIL, 1926.

	£		£
Notes and Certificates Outstanding	} 294,473,000	Silver Coin . . . . .	6,550,000
Investments Reserve Account . . . . .		} 12,160,000	Bank of England Notes <sup>1</sup>
		Government Securities	243,681,000
		Balance at Bank of England . . . . .	161,000
	<u>£306,642,000</u>		<u>£306,642,000</u>

*Scotch and Irish Bank Notes.*—In both Scotland and Ireland a considerable proportion of the circulating currency consists of bank notes of £1 and upwards issued by various banks under the provisions of the Scotch Bank Act of 1845 and the Irish Bank Act of the same year, which extended to the two countries the policy of the Bank Charter Act, 1844. In Scotland there are at present eight note-issuing banks and in Ireland six. The authorised issues of each of these banks is limited to the average amount of their issue in the twelve months preceding the passing of the relative Bank Act, but any bank may exceed the limit if it holds coin or bullion against the excess issue at its head office or principal place of issue.

Scotch and Irish Bank notes are *not* legal tender in the respective countries, although notes of the Bank of Ireland are legal tender for payment of Irish revenue.

## Banking and the Currency.

It is impossible in this book to discuss fully the many important problems which arise from a relationship of the banking institutions and the currency of the country, but the reader will

<sup>1</sup> In April 1925, £27,000,000 in gold was transferred from the currency notes reserve to the Bank of England in exchange for bank notes, with the object of strengthening the central gold reserve preparatory to our return to the gold standard.

appreciate at once that it is a vital concern to a banker, conducting a vast volume of operations upon credit, to know whether the currency system of his country is organised on sound lines. We have seen that all credit instruments and the system of credit generally are based upon the ultimate right of the creditor to demand legal tender money in payment. Before the War legal tender in this country meant gold or Bank of England notes, which were as good as gold, and in fact our vast superstructure of credit has been built up upon the foundation of payment in gold. Nowadays, however, the bulk of our currency consists of treasury notes, gold having been entirely displaced from circulation, and having now accumulated in the vaults of the Bank of England. The total amount of treasury notes in circulation is in fact far in excess of the total amount of our gold reserves, and when it is remembered that money of this kind can be created by the government merely by putting into operation the machinery of the printing-press, it will be understood that the displacement of gold by Treasury promises to pay has been a matter of the greatest concern to our bankers and financiers.

Under the *Currency and Bank Notes Act, 1914*, treasury notes were made technically convertible into gold, but convertibility was not a reality, because it was made a summary offence to "melt down, break up, or use otherwise than as currency any gold coin". Thus, with the automatic check of convertibility removed, the government was enabled to finance its internal transactions by the simple expedient of increasing the issue of treasury notes. But the evil did not end there. The notes issued (being legal tender) continually increased the cash holdings of the joint-stock banks, and, in accordance with the explanation given in Chapter 3, formed the cash basis of a huge expansion of bank credit. The inevitable result of this *inflation* of the currency and of bank deposits was that prices soared to unprecedented levels, and in 1918 the evil effects of this alarming development had become so apparent that a Treasury Committee, under the chairmanship of Lord Cunliffe, then Governor of the Bank of England, was appointed "to consider the various problems which will arise in connection with currency and the foreign exchanges during the period of reconstruction, and report upon the steps required to bring about the restoration of normal conditions in due course".

It was on the recommendation of this Committee that the first check on the government's inflationary policy was imposed, when the proposal to make the maximum fiduciary issue of treasury notes in any year the *legal* maximum uncovered issue of the following year was embodied in a Treasury Minute dated December 1919. As the following figures reveal, the adherence to this limit—known as the "Cunliffe limit"—has led to a gradual decline in the fiduciary circulation.

### Legal Maximum Fiduciary Issues of Treasury Notes, 1920-26

	£ million.
1920 . . . . .	320.6
1921 . . . . .	317.6
1922 . . . . .	309.9
1923 . . . . .	270.2
1924 . . . . .	248.2
1925 . . . . .	248.2
1926 . . . . .	247.9

With the tide of inflation definitely stemmed, the way was prepared for our return to an effective gold standard. In both its Interim and Final Report, the Cunliffe Committee had advocated a return to the gold basis as soon as our financial and trade position warranted, and, as every reader is aware, this important step was taken in April 1925, with the passing of the Gold Standard Act.

#### The Gold Standard.

Under our new currency arrangements we have, in effect, a gold exchange standard, a system under which gold is freely available for export or import, but is not employed as the circulating medium. The following is a statement of the existing position.

In the first place, the right to present gold bullion to the Mint for conversion into coin is confined to the Bank of England, but, under Section 4 of the Bank Charter Act, the Bank is still compelled to buy gold offered to it at the rate of £3, 17s. 9d. per standard ounce.

Secondly, neither Bank of England notes nor treasury notes are convertible into gold coin for internal purposes, the object of this provision being "to prevent the internal circulation of gold coin until such time as the gold standard has been firmly re-established for the purpose of international transactions". On the other hand, holders of any "legal tender" are entitled to demand in exchange, at the head office of the Bank and during office hours, gold bars containing approximately 400 ounces of fine gold, at the rate of £3, 17s. 10½d. per standard ounce.

Finally, since Section 3 of the Currency and Bank Note Act is not repealed, the Bank of England still has power, subject to Treasury sanction, to increase its fiduciary issue beyond any limit fixed by law, the only check to the further issue of uncovered currency notes being the Treasury Minute of 1919.

Thus, although we have restored the underlying principle (i.e., free gold exports) of an effective gold standard, we have not

reverted to our pre-war practice. Many technical issues still remain to be decided, e.g., whether, when the two note-issues are amalgamated, we shall return to the principle of a fixed fiduciary issue (presumably of some £250 millions) or adopt some more elastic arrangements, and whether we shall restore gold to active circulation. In whatever manner these issues are decided, however, it is certain that the relative importance of gold coin and paper money which existed in pre-war days has been reversed. In future, paper will form the bulk of our currency, but, through convertibility, will be definitely linked to gold.

There is little doubt that Britain's return to gold after a period of unparalleled financial upheaval was an event of world-wide importance, and, as Mr McKenna has stated, the psychological and moral aspects of the matter are of almost greater significance than the purely economic and financial considerations. The gold standard implies an international measure of value, ensuring an automatic adjustment of prices and of the exchanges, while it inspires that confidence in the future which is so vital to a return to more normal and more stable business conditions. So far as our own country is concerned, her prosperity and greatness are undoubtedly linked with the gold basis of exchange, internal and external, and, as has already been shown, London's prestige as an international centre is built on her world-wide reputation for immediate payment in gold upon demand. The resumption of the gold standard betokens the return to that parity between sterling and gold which existed for over one hundred years prior to the War. It means the re-establishment of the fact that the purchasing power of sterling and the purchasing power of gold are synonymous—a fact which has endowed the British monetary unit and British instruments of credit with a world-wide prestige.

## PART II

# THE CUSTOMER

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### CHAPTER 7

#### WHAT CONSTITUTES A CUSTOMER

IN spite of the fact that at times it becomes imperative to define exactly what is to be understood by the term "customer of a bank", there exists no legal definition, and we are accordingly faced with much the same difficulty as we experienced in connection with the term "banker". No definition of a customer is given by the Bills of Exchange Act, 1882, although, as we shall see later, certain important sections of that Act depend essentially upon the exact application of the term. The cases which have turned upon these sections give us little further guidance, for, as Sir John Paget points out, the legal decisions upon the point are conflicting to a bewildering degree.

Nevertheless, it would appear from the views expressed by various eminent jurists that it is correct to regard a customer *as anyone who has some sort of an account with the banker*. Thus in the case of *Great Western Railway Company v. London and County Bank*, 1901, Lord Davey stated that a customer "is a person who has some sort of an account, either deposit or current account or some similar relation" with a banker, and from this it follows that any person or corporation may become a customer by opening a deposit or credit current account, or by accepting an advance on current or loan account, or even by accepting a deposit receipt in acknowledgment of money left with the banker.

This definition also implies that the legal relationship of a banker and customer is originated as soon as an account is opened, and it was, in fact, laid down definitely in the case of *Ladbroke v. Todd*, 1914, that the first transaction between a banker and another party is sufficient to render the latter a customer in the legal sense, as for example, when a man pays in cheques for collection and credit to a new current account. In this case the judge stated, "It is not necessary that the person should have drawn on any money or even that he should be in a position to draw any money",—the relationship was established as soon as the account was opened. It is clear, therefore, that neither the number of transactions nor the period during which business has been conducted between the parties is material in

determining whether or not a person is a customer, but it is essential that some form of account be opened. It is not sufficient to constitute a person a customer that the bank performs for that person a casual service, as by occasionally cashing cheques or accepting valuables or securities for safe custody. In this connection the following extract from the judgment of the Judicial Committee of the Privy Council in *Commissioners of Taxation v. The English, Scottish and Australian Bank*, 1920, is of importance: "Their Lordships are of opinion that the word 'customer' signifies a relationship in which *duration* is not of the essence. A person whose money has been accepted by the bank on the footing that they undertake to honour cheques up to the amount standing to his credit is, in the view of their Lordships, a customer of the bank in the sense of the statute, irrespective of whether his connection is of long or short standing. The contrast is not between an habitu  and a new-comer, but between a person for whom the bank performs a casual service, e.g., cashing a cheque for a person introduced by one of their customers, and a person who has an account of his own at the bank".

### Who may be a Customer ?

At a later stage the legal relationship of a banker to his customer will be considered at length, but here it may be stated that the opening of an account with a bank involves the making of a definite *contract* between the bank and the customer. A contract is defined by a famous authority<sup>1</sup> as "an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others". In other words, a contract is an agreement which carries with it certain legal rights and obligations, and although the law presumes, until the contrary is proved, that every person has power to bind himself by contract with another person or persons, there are certain persons whose contracts the law will not enforce, while others can legally bind themselves only if certain formalities prescribed by statute are complied with. Unless, therefore, the parties to an agreement have the necessary *contractual capacity*, as it is called, or unless the agreements are made in proper form, the contracts can be set aside as being null and void or unenforceable at law, so in the case of a contract between banker and customer, as in the case of all other contracts, it is important for both parties to assure themselves that no such disabilities or defects exist.

Apart from the foregoing, it must be understood that while anyone who has capacity to enter into contracts can open an account at a bank, it is not incumbent upon the banker to accept anyone who comes along as a customer. The banker cannot be

<sup>1</sup> Anson, *Contracts*, p. 9.

compelled to enter into a contract if he does not wish to do so, and in fact occasions do arise when it is in his best interests to refuse to accept certain accounts in any circumstances.

It is for these reasons that a bank is careful to require an introduction or to make enquiries as to character and standing before it will definitely agree to conduct an account for a new customer, and it is for these reasons also that anyone with any pretensions to be a banker should be acquainted with at least the elements of the law governing the contractual capacity of the various types of customers with whom he is likely to meet in the course of his business. Lawyers often quote the famous rule *Ignorantia juris neminem excusat* (no one can escape liability for his actions merely because he was ignorant of the law), and to this long established principle a banker must conform in the same way as any other member of the community.

### Personal and Impersonal Customers.

The importance of the foregoing will be still further appreciated when it is pointed out that a "person" in law is not necessarily a human being, but may be one of the many forms of *legal persona* or "bodies corporate" constituted by law, and having power to contract in accordance with certain well-recognised legal principles. Included in this category are limited companies, partnerships, local authorities, building and friendly societies, trade unions, charity associations and institutions of various kinds, all of which have to comply with certain legal formalities if they are to be legally constituted and validly conducted.

Thus, we may for convenience divide the customers of a banker into two broad groups, (a) *impersonal customers*, and (b) *personal customers*, including in the former class the various types of corporation and association to which we have referred, and reserving the latter group for private individuals, private traders, professional men, married women, trustees and executors. As will be seen later, partnerships may to some extent be regarded as belonging to either group, but are best considered as personal customers.

In the following pages, the principal features of the law governing the contractual capacity of the various personal and impersonal customers of a bank are briefly discussed.

### Individuals Generally.

As already stated, every individual is *presumed* at law to have power to enter into a binding contract with another person or with other persons, and if such a contract is otherwise validly made, the law will, if necessary, enforce its performance or award damages to the party injured by the breach of such con-

tract. As a general rule, therefore, any person is legally capable of opening an account with a banker if the latter is satisfied as to that person's *bona fides* and is willing to enter into the necessary business relations. There are, however, certain classes of persons whose power to make valid agreements is subject to well-recognised restrictions, as for example, married women, infants (i.e., persons under twenty-one years of age), undischarged bankrupts, lunatics and drunken persons, while others may for the time being occupy positions of trust necessitating special care on the part of persons entering into agreements with them. Among the latter are agents of all kinds, trustees, executors and administrators.

### Married Women.

The law relating to married women is far from satisfactory. Although a married woman can enter into contracts and hold property in her own right as if she were unmarried, her creditors have no remedy against her if she has no separate estate, and even if she has separate property, it may be held in trust for her subject to what is known as "*Restraint upon Anticipation*", i.e., the property may be settled upon her in such a way that she can only use the income as it falls due and can neither touch the capital nor *anticipate* the income. Moreover, there is no *personal* remedy against a married woman, for she cannot be committed to prison for non-payment of a judgment debt, while, although she has *implied* power to bind her husband for necessaries for herself and the household, the husband can escape liability if he can prove that she is already well supplied or that he has forbidden her to pledge his credit.

It is clear, therefore, that the making of contracts with a married woman is beset with difficulties, and contracts involving the liability of such a person should not be entered into unless very careful precautions are taken to safeguard against loss.

### Infants.

At law, any person under twenty-one years of age is an *infant* and, as such, has a very limited power to enter into binding agreements. As a general rule, all contracts made by an infant are *voidable*, i.e., he may repudiate them at his option, but there are certain agreements which have been made binding upon an infant by statute, while others have been declared by statute to be absolutely void. Examples of voidable contracts are agreements by an infant to take shares in a company or to enter into marriage settlements, and contracts of tenancy or partnership, all of which the infant may repudiate if he wishes, but by which he will be bound unless he repudiates them within a reasonable time of attaining full age.



For our present purpose, however, we are primarily concerned with an infant's contracts for the payment and loan of money. In regard to the latter, Section 1 of the *Infants Relief Act, 1874*, provides that:—

All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable.

From this section it is clear that all agreements made by an infant for the purchase of goods other than necessaries, and for the loan of money, are *absolutely void* at law. By Section 2 of the same Act it is enacted that no action can be brought in respect of any *promise* to repay such debts, or in respect of any *ratification* of such void contracts, made by an infant after his attainment of full age. This provision is still further confirmed in so far as it relates to *loans of money* by Section 5 of the *Betting and Loans (Infants) Act, 1892*, which also declares as absolutely void against any persons whomsoever any *instrument*, negotiable or otherwise, given by an infant in satisfaction of any loan incurred by him before his attainment of full age. Thus a bill or cheque given by an infant to repay money borrowed by him during infancy is entirely void, and no action can be brought either on the promise or on the instrument by any party or holder against any party or previous holder. The law goes even further than this, for in *Leslie v. Sheill, 1914*, it was held that an infant cannot be compelled to repay money which he had borrowed even though he had obtained the loan by *falsely* representing himself to be of full age.

It follows, therefore, that in no circumstances should an infant be granted a loan or overdraft on his own undertaking or security to repay, for not only is the money advanced irrecoverable, but any securities belonging to the infant must be returned (*The Nottingham Permanent Benefit Building Society v. Thurstan, 1903*). On the other hand, a lender can enforce his rights against any third party who has given security for a loan to an infant.

The capacity of an infant to contract by bill (or cheque) is strictly defined in the following terms by Section 22 of the *Bills of Exchange Act, 1882*:—

22. (1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

(2) Where a bill is drawn or endorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or endorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

The effect of this section is that although an infant, having no capacity to contract, cannot render himself liable on a bill or

cheque (even if it is given in payment for necessities), any cheque drawn or indorsed by him or any bill drawn, indorsed or accepted by him is nevertheless valid for all other purposes and may be enforced by or against any other parties thereto, *unless*—and this is a very important exception—the bill is given in payment of a loan which is void under Section 5 of the Betting and Loans (Infants) Act, 1892, referred to above. This means that a banker or other person holding funds of an infant against which a cheque or bill is drawn, is absolutely discharged on payment of the instrument from his obligation to the drawer in respect of an equivalent amount of the funds in his hands.

But while an infant is thus generally absolved from liability on his contracts, there is nothing to prevent him from acting as an *agent* for a principal, and as such entering into contracts on his principal's behalf, including the drawing and endorsing of cheques and bills. Furthermore, if he has distinct authority to do so, he may purchase goods and obtain advances in the name of his principal, although it would clearly be to the advantage of the other parties to such contracts to obtain written confirmation of such authority before completing the necessary arrangements.

Similarly an infant may be a *partner* in a firm and may transact business on its behalf, including the drawing and endorsing of cheques and bills, but he cannot be held liable for any debts of the partnership incurred before his attainment of full age. On the other hand, unless he expressly repudiates the contract of partnership on attaining his majority, he will be regarded as having ratified the agreement and will become liable as a general partner for any debts thereafter incurred by the partnership.

By the *Law of Property Act, 1925*, it is provided that an infant cannot be appointed as *trustee*, or obtain a grant of probate, but where an infant is nominated as *executor*, a temporary grant of administration may be made to his guardian to operate until he attains full age.

The same Act also provides that a legal estate in land cannot now be conveyed to an infant, but that any receipts for income given by *married* infants shall be valid.

## Trustees.

A trustee is a person who is entrusted with property in order that he may deal with it in accordance with directions given by the creator of the trust. As a rule, the appointment is made in a *Trust Deed* which indicates on whose behalf or for whose benefit the trust is created, such a person being described as the *cestui que trust* (pl. *cestuis que trustent*). Thus trustees may be appointed under a will to control and administer a deceased person's estate for the benefit of the beneficiaries, or under the

constitution of a charitable institution or other society for the administration of its estate and finances.

The law relating to contracts by and with trustees is particularly rigid. They must exercise such care over the trust property as a reasonable business man would of his own property, and must not make any profits out of the trust. As a rule, their powers are clearly defined in the trust deed by which they are appointed, and although persons transacting business with trustees are not expected to be acquainted with the provisions of the deed, they may nevertheless render themselves liable if they are party to any transaction which is clearly in defiance of the usual conditions attaching to trusteeships. Thus the average person is presumed to know that the trustees must usually act together, and that they cannot employ agents and delegate their authority except in special circumstances, which are thus defined by Section 23 (1) of the *Trustee Act, 1925* :—

Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stock-broker, or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the payment and receipt of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if *employed in good faith*.

The Act proceeds, however, to make it clear that these provisions will not exempt a trustee from liability if he permits any money, valuable consideration or property to remain in the hands of, or under the control of, a solicitor or banker for a period longer than is reasonably necessary for such an agent to pay it over or to transfer it to the trustee.

Section 25 of the same Act permits any trustee who intends to remain abroad for more than one month to delegate, *by power of attorney*, to any person (including a trust corporation) either alone or jointly with other persons, authority to exercise any or all the powers vested in him as trustee, but the *attorney* is not permitted to delegate to another person any of the powers so conferred upon him. If there are only two trustees, the second trustee cannot be appointed attorney for the other, except where the second trustee is a trust corporation. Any person dealing with the attorney may accept, as conclusive evidence that the power has come into operation, the statutory declaration of the trustee that he intends to remain out of the United Kingdom for over one month, and a statutory declaration by the attorney that the power of attorney has come into operation. The power of attorney does not come into operation unless and until the trustee is out of the United Kingdom, and is revoked on his return to the United Kingdom.

Trustees have no power to borrow and give security for the purpose of the trusteeship unless this power is expressly conveyed

to them by the Deed of Trust, or they are authorised by the Deed to apply or pay capital money in accordance with the trust, in which case they are deemed to have authority to raise such money on mortgage of all or any part of the property. But even if this power is expressly given, the trustees are all individually liable for any loans they may incur, the object of the law being, of course, to prevent trustees from pledging trust property for their own purposes.

Usually, the trust deed provides for the appointment of a new trustee in the event of the death of one of two or more joint trustees, but if no such provision is made and if a new trustee is not appointed by the other trustee or trustees, or by the representative of the deceased trustee, then the surviving trustee or trustees may act for all purposes. Similarly when a trustee becomes bankrupt, his place may be taken by a new trustee appointed by the others, and in the case of a trustee in bankruptcy, such appointment *must* be made.

The powers and duties of *trustees in bankruptcy* are strictly defined by the Bankruptcy Act, 1914. Under this Act such a trustee is forbidden to pay monies had and received by him in connection with his trusteeship into his private account, and is required to pay all such monies into the Bankruptcy Estates Account at the Bank of England unless he obtains permission from the Board of Trade to keep the bankruptcy account at a local bank.

With the permission of the Committee of Inspection, a trustee in bankruptcy can mortgage or pledge the bankrupt's property for the purpose of raising money to pay the bankrupt's debts. Notwithstanding this, however, a trustee who so borrows incurs a *personal* liability, although he is entitled to be indemnified out of the estate.

### Liquidators of Companies.

A liquidator is a person appointed to wind up the affairs of a company. His business is to realise its assets and to collect any amounts owing by the shareholders, applying the funds in payment of the company's debts and distributing any balance among its members. Usually a liquidator's powers are subject to the supervision of a Committee of Inspection, but in any case his acts are controlled by the Companies (Consolidation) Act, 1908. This Act defines his powers according as the company is being wound up (a) *compulsorily*, i.e., by order of the Court; or (b) *voluntarily*; or (c) voluntarily but *subject to supervision* by the Court. In any of these cases the liquidator is given express powers by the Act to borrow money against the security of the company's assets, and to draw, accept, make and indorse bills and notes in the name of and on behalf of the company. In the

exercise of any such powers the liquidator is free from any *personal* liability.

Unless the Board of Trade gives permission for a liquidator to keep his account at a local bank, all monies had and received by him must be paid into the Companies' Liquidation Account at the Bank of England.

### Executors and Administrators.

Upon the death of an individual, his estate becomes vested in his personal representatives. If he has made a will, and has named therein a person or persons whom he wishes to administer his estate, such a person or persons will be known as his *executor* or *executors*, and upon them devolves the first duty of submitting a copy of the will, together with an estimate of the value of the estate, to the Probate Registry for registration and proof of the will. When this is effected, what is known as "*Probate*" of the will is granted, i.e., a copy of the will under the seal of the Registry is issued with a certificate that the will has been proved, and the executors are thereupon in a position to go forward with the realisation of the estate and its distribution among the beneficiaries in accordance with the terms of the will.

If, however, no will can be found or no executor is named, the estate will vest in the Court of Probate until some person interested in the administration of the estate, such as a legatee, relative or creditor, presents himself before the probate officer and makes a statement upon oath concerning the value of the estate and his relationship to the deceased, after which a document under the seal of the Probate Registry, described as *Letters of Administration*, is granted vesting the estate in the applicant, and empowering him to deal with the estate as may be necessary. An administrator is required to settle the affairs of a deceased in accordance with the law, whereas an executor settles them according to the terms of the will under which he is appointed.

It is clear that the probate or letters of administration comprise the authority of the representatives of the deceased to deal with the estate and to wind up his affairs, and for this reason it is important that anyone who has business relations with the estate of the deceased should have an opportunity of becoming thoroughly acquainted with the contents of the official document.

As already stated, all transactions relative to the estate of a deceased person after notice of the death must be made with the personal representatives, and accordingly anyone possessing funds belonging to a deceased person must hold them intact at the disposal of such representatives. At the same time, no dealings with the estate should as a rule be permitted until the official probate or letters of administration have been inspected, although in practice it is not unusual for a solicitor or banker to

grant facilities to persons who are known to be the representatives of a deceased pending the issue of the official documents.

Executors differ from trustees in the important respect that, if there is more than one executor, the law permits any one executor to act on behalf of all in the majority of matters connected with the estate, as for example the payment or release of debts. Moreover, it is within the power of any executor to countermand instructions given by another, and accordingly any one executor can, if he so desires, stop payment of a cheque drawn by a co-executor upon an executorship account.

A married woman may be appointed executrix (Section 24, Married Women's Property Act, 1882), and her husband will not be liable for her acts unless he interferes with her duties in the capacity of executrix.

On the death of one of two or more executors, the estate may be administered by the survivor or survivors unless the will provides otherwise. On the death of a *sole* executor, or of a sole surviving executor, the estate may be administered by his own executor. If, however, before the estate is administered an administrator dies, or a sole executor dies intestate, the Court will issue fresh letters of administration appointing another person, called an administrator *de bonis non* (a contraction of *de bonis non administratis*=goods not administered) to complete the winding up of the estate.

It is quite usual for executors to borrow money in order to discharge urgent debts or obligations of the deceased, but it is to be noted that for any advances so obtained the executor or executors are personally liable unless specific assets of the deceased are given as security for the loan, for an executor has no power to borrow money so as to bind the general estate.

### Lunatics and Drunken Persons.

Any person entering into a contract is presumed by law to have been of sound mind and in full possession of his faculties at the time the contract was made. If, however, one party to a contract, or his representative, can prove that at the time of entering into the contract he was incapable, either from drunkenness or insanity, of realising what he was doing, *and that the other party was aware of this fact*, he may have the contract set aside by the Court. In other words, contracts with lunatics or drunken persons are *voidable*, although by Section 2, Sale of Goods Act, 1893, such persons cannot escape liability under an agreement to pay for the supply of necessaries if the price is reasonable. Furthermore, if the other party was *unaware* of the incapacity at the time the agreement was made, then the contract will be binding. As a rule also a contract made during a period of incapacity may be ratified when the person concerned becomes normal, but this does not apply to persons who have been found

lunatic by inquisition, i.e., on enquiry at the direction of the Court. In the latter case, it is usual for the Court to appoint a committee or *curator bonis* in whom the administration of the affairs of the insane person is vested subject to the direction of the Masters in lunacy.

It is clear, therefore, that considerable care is required in conducting business with persons who are suspected of insanity or who are known to be habitual drunkards, for it is not unlikely that such persons may be able to avoid liabilities and obligations which they have assumed. Thus, if a person signs a bill of exchange or a cheque during a period of mental incapacity, and the party taking the instrument is aware of the fact, the document will be unenforceable against the person so signing except by a holder in due course who had no notice of the incapacity. At the same time it is, of course, dangerous to accuse or pointedly suspect any person of mental incapacity without good cause for so doing, and in the case of a banker particularly, it is imperative that he should not act upon hearsay evidence of such conditions.

### Aliens.

As a general rule an alien or foreigner has exactly the same powers to contract under British law as a British subject, except that such a person may not hold shares in a British ship. This, however, does not apply to an *alien enemy*, i.e., the subject of a state with which this country is at war, for such a person can neither enter into a valid contract nor sue or be sued in British courts while his enemy status exists. Furthermore, a partnership between a British subject and an alien is automatically dissolved upon the outbreak of war between this country and the country of the alien, while a British subject who resides in, or allies himself with, an enemy state renders himself liable to be regarded as an alien enemy.

### Bankrupts.

A bankrupt is a person who has been adjudicated bankrupt by the Court in consequence of having committed one of eight *acts of bankruptcy*, upon which a bankruptcy petition may be presented to the Court by the debtor, or by one of his creditors, asking that a receiving order may be made for the protection of the bankrupt's estate in the interests of his creditors generally. Such an act of bankruptcy is committed, for example, when a debtor gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts, or if he files in the Court a declaration of his inability to pay his debts, or if he assigns his property to a trustee or trustees for the benefit of his creditors generally, or if he disappears with the object of defrauding or delaying his creditors, e.g., begins "to keep house".

Any person who has capacity to contract may be made bankrupt. A married woman who carries on a trade or business either with her husband or separately can be made bankrupt, but only in respect of her separate property not subject to restraint. A lunatic can, with the consent of the Court, be made bankrupt for debts incurred while sane. Convicts may be made bankrupt, even after conviction. Though a dead man cannot be made bankrupt, his estate may be administered in bankruptcy. Foreigners are subject to British bankruptcy laws if within a year previous to the presentation of the petition they ordinarily resided or had a place of residence or were carrying on business in England, personally or by means of an agent, or were members of a partnership in England. Any one or more members of a partnership may be made bankrupt without involving the partnership in bankruptcy. On the other hand, the bankruptcy of a partnership involves the bankruptcy of the individual partners, and although bankruptcy proceedings may be instituted against a partnership itself, the order adjudging it bankrupt is made against each of the partners individually.

A joint-stock company cannot be made bankrupt, but it may be wound up in accordance with the Companies (Consolidation) Act, 1908, and Companies (Winding Up) Rules, 1909. An infant cannot be made bankrupt even if he carries on a trade, but it is possible that any debt or obligation which is enforceable against him during infancy may (unless statute barred) be the subject of a bankruptcy petition when he comes of age, e.g., a judgment for necessities supplied.

When a bankruptcy petition has been heard by the Court, and evidence has been taken regarding the debtor's affairs, the Court, if satisfied regarding the insolvency, will usually make a *Receiving Order* against the debtor. The effect of this is to vest the whole of the debtor's property in the hands of the *Official Receiver*, whose business it is thereafter to administer it for the benefit of the creditors generally, the object being to protect the property from the debtor and also from any individual creditors who may seek to obtain preferential treatment.

If the Official Receiver considers that it is in the interests of the creditors generally or that the nature of the business demands it, he may appoint a *special manager* of the estate, vesting him with special powers for the administration of the debtor's affairs.

Notice of every Receiving Order is advertised in the London, Dublin or Edinburgh Gazette, and also in a local paper circulating in the area wherein the debtor lives. Notices also appear in such papers as *Perry's Gazette* and *Stubb's Gazette*, which are regularly searched by bankers and others likely to be affected by local bankruptcies. After the making of the Receiving Order no one is entitled to deal in any way with the debtor's property except the Official Receiver, who takes steps to convene meetings



of the creditors and to obtain from the debtor a "*Statement of Affairs*" in recognised form, giving full particulars of the debtor's assets and liabilities, the names of his creditors and particulars of the securities held by them. In addition arrangements are made for the debtor to undergo a public examination in open Court concerning his conduct, dealings and property, notice of the date of the examination being given to all the creditors and being published in the *Gazette* and in a local paper.

If a majority in number and three-fourths in value of the creditors so decide, a *Scheme of Composition* may be arranged under which the creditors agree to accept so much in the £1 in full discharge of their debts, and if the Court approves the arrangement, it will be binding on all the creditors proving in the bankruptcy. Otherwise, the Court will adjudicate the debtor bankrupt, in which case it is usual to appoint a person to act as *trustee* of the property of the bankrupt for the benefit of his creditors. The acts of the trustee are subject to the control of the Board of Trade, and usually also to a Committee of Inspection which may be elected from among the creditors.

The duties of the trustee are to realise the property of the bankrupt as quickly as possible, and to the best advantage of the creditors, and after his appointment all transactions with the bankrupt's estate have to be made through him and all property of the bankrupt vests in him. His general functions are rigidly controlled by law embodied in the *Bankruptcy Act, 1914*, and upon the realisation of the estate he is required to distribute it among the creditors in a certain definite order.

Considerable powers are vested by law in the Official Receiver and trustee in bankruptcy. For example, the trustee may in certain circumstances reclaim and bring back into the divisible estate property which has already been assigned by the debtor, or which has been transferred out of his possession or ownership under a voluntary settlement or under a fraudulent preference to one or some of the creditors. For this reason it is of the first importance that no business transactions should be entered into with a debtor by any person or persons who have notice that he has committed an act of bankruptcy, or that a petition has been presented against him, or that a receiving order has been made in connection with his estate.

### Undischarged Bankrupts.

At any time after the making of the order adjudging him bankrupt, the debtor may apply to the Court for an *Order of Discharge*, releasing him from bankruptcy. This may be granted by the Court after hearing the evidence of the bankrupt and of the Official Receiver, but in certain cases it must be

refused altogether, as for example, where the bankrupt has committed a felony or any misdemeanour in connection with his bankruptcy.

Until such a discharge is obtained, an insolvent debtor who is made bankrupt is described as an *undischarged bankrupt*, and, as such, he is subject to a number of disqualifications, e.g., he cannot be appointed a justice of the peace, or accept office as a mayor, alderman, or councillor. Moreover, such a person is guilty of a misdemeanour if he obtains credit of £10 or upwards, or engages in a trade or business under another name, without disclosing the fact of his bankruptcy. In regard to monetary transactions with such a person, see *post*, Chapter 14.

### Agents.

A considerable proportion of the transactions between a banker and his customers are effected through the intermediary of agents, and it is therefore of first importance that every bank official should have some knowledge of the principles of the law of Agency.

An agent is a person employed by another, called the principal, to act on his behalf, and may belong to one of three classes. He may be (a) a *Universal Agent*, having unrestricted authority to bind the principal by all lawful and legal acts; (b) a *General Agent*, having power to do anything within the authority given to him by the principal, or having power to bind the principal in all transactions arising out of a specified business or matter, or (c) a *Special Agent*, appointed for a particular purpose or occasion only.

An example of a universal agent is a solicitor acting under power of attorney as the representative of a principal resident abroad. The powers of a general agent are determined largely by custom or the usage of trade, as for example, in the case of the manager of a bank or of a shop, who is a general agent for his employers in all matters connected with the particular business. Special agents are entrusted with a specific commission only, as for example, to buy a house or to sell a horse, and in such cases the principal is not bound by any act of the agent outside the authority given. Auctioneers, stockbrokers, solicitors, commercial travellers and factors, are examples of agents who ordinarily fall within the third class.

Although it is always advisable that an agreement between a principal and his agent should be properly drawn up in writing, no such formality is necessary unless the agency is to continue for a period over one year (Section 4, *Statute of Frauds*). An agent may be appointed (a) *expressly*, i.e., by word of mouth, by writing not under seal, or by deed, such as a power of attorney; or (b) *impliedly*, i.e., where the agency is inferred

from the conduct of the parties ; or (c) *by ratification*, i.e., where an unauthorised person contracts or acts as an agent and the principal for whom he so purports to act either expressly or by his conduct ratifies or adopts the contracts made.

It is clear that third parties can be certain of the exact powers of an agent only if the appointment is made expressly in writing, and they have knowledge of the terms. In the case of an *implied* agency, however, the powers of the agent and the extent to which his acts will bind the principal depend very largely on the conduct of the parties, the usual course of business between them, and the usage or customs of the particular trade. It is therefore of importance that third parties should exercise extreme care in dealing with an agent, for if they are aware that the latter is exceeding his actual or implied powers, then the principal will not be bound.

The chief difficulties arise in connection with *agencies by implication*, examples of which are the agency of a wife to bind her husband or of a servant to bind his employer. Thus, third parties are correct in assuming that a wife has power to bind her husband for the purchase of necessary household goods, but the husband may repudiate liability if he can show that the wife is already sufficiently supplied, or that he has forbidden her to pledge his credit. Similarly, a garage proprietor may be accustomed to supply a chauffeur with petrol and execute mechanical repairs on account of the employer, but it is very important if the latter is to be bound that the supplies and repairs should be reasonable in all the circumstances. Again, a principal may appoint an agent to draw cheques upon his account, or to cash cheques not exceeding a specified figure, but it is imperative that the banker should see that the authority in such cases is explicit, and that it is not exceeded in any circumstances. For example, an authority to draw cheques on an account does not empower the agent to overdraw that account.

### The Duties of an Agent.

An agent's duties are to carry out the work entrusted to him *in person*, with ordinary skill and diligence and strictly in accordance with the terms of his appointment. In the absence of express arrangement, he is not as a rule entitled to delegate his authority to another ; thus a secretary or other official who is empowered to sign cheques for his employer is not entitled to depute such work to another (see Chapter 13). An agent is also required to keep his principal properly informed of all matters relating to the agency, to keep proper accounts and to render them when required, and to account to his principal for all profits resulting directly or indirectly from the agency. Any secret profit made by the agent in the course of his duties may

be claimed by the principal, while, if the agent is bribed, the principal may repudiate the contract with the person responsible for the bribe and proceed against him for damages.

### **Rights of an Agent.**

In return for his services the agent has a right to the agreed or a reasonable remuneration, together with any necessary expenses. He is also entitled to be indemnified against any losses or liabilities which he may have incurred in the proper exercise of his duties. On the other hand, an agent without authority, who represents that he has authority to act on behalf of his principal, is personally liable for breach of warranty of authority for any loss sustained by a third party who relies upon the representation, and this is so even if the agent, in making the representation, acted in good faith and was under the impression that he had such an authority. A case of this kind may arise, for example, when the authority of the agent is automatically revoked by the death, insanity or bankruptcy of the principal without the knowledge of the agent or the third party. In some cases, too, an agent has a right of *lien* on goods coming into his hands in connection with the agency until his charges are satisfied, this lien being either a *particular lien*, i.e., applying only to the specific goods in connection with which the agency arises, or a *general lien* over all property of the principal which comes into the hands of the agent in the usual course of business. This matter is explained in Chapter 22.

### **Termination of Agency.**

The contract of agency is terminated by revocation on the part of the principal or by renunciation on the part of the agent, or by the expiration of the period, if any, for which the agency was entered into, or by performance or completion of the business for which the agency was created, or by the death or insanity of either party, or by the bankruptcy of the principal. A specific agency is also terminated by the destruction of the subject-matter. Thus, if an agent is employed to sell a horse and the animal dies before the sale, the agency is terminated.

In all cases, however, it is necessary that third parties who have been accustomed to transact business with an agent should be properly informed of the termination of the agency if the principal or his estate is to escape liability for any subsequent acts of the agent. Accordingly, it is usual for a principal who desires to safeguard himself in this respect specifically to advise persons with whom he is accustomed to transact business, and also to insert an advertisement for the benefit of the general public in a local paper and in the trade papers. As already stated, the death, insanity or bankruptcy of the principal at once

puts an end to the authority of the agent, and in such cases it is important that third parties should not after receipt of notice of any of these events transact any business with the agent on the principal's behalf. Thus a banker who has been authorised to allow an agent to operate a customer's account should at once suspend all operations on that account upon hearing or being notified of the principal's death, bankruptcy or insanity. The death or insanity of the agent necessarily brings the agency to an end, but the *bankruptcy* of the agent does not of itself terminate his authority.

### Signature by an Agent.

From a banker's point of view it is important that the signature of an agent to any document which passes through the banker's hands should be in correct and recognised form. In this connection, Section 26 of the Bills of Exchange Act, 1882, is of importance, and provides as follows :—

26. (1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

From this it will be seen that an agent may become personally liable upon a bill of exchange or other document, unless in signing on behalf of his principal he gives the principal's name and indicates clearly that he is acting in a representative capacity; he does not become exempt from liability merely by adding words to his signature describing himself as an agent. He must indicate that he signs on behalf of the principal, unless of course he has been empowered to sign the principal's own name.

The most usual way in which an agent signs for a principal is by what is termed a *per procuracion* signature, which generally appears as follows :—

*per pro.* James Brown,  
Henry Jones.

*p.p.* James Brown,  
Henry Jones.

In regard to such signatures Section 25 of the Bills of Exchange Act, 1882, provides :—

25. A signature by procuracy operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

It follows from this section that anyone accepting a signature by procuracy is deemed to have notice that the agent has only

a limited authority to sign on behalf of the principal, and that authority may be only for a certain specific purpose. Thus an agent may have authority to endorse cheques paid in to his principal's account, but he may not have authority to *draw* cheques or to draw or *accept* bills of exchange on behalf of his principal. There is, in fact, considerable danger in third parties indiscriminately accepting signatures of this kind by one person on behalf of another, and it is to be regretted that such signatures are in practice frequently accepted in the absence of a proper arrangement. In particular, a banker runs considerable risk if he permits an agent, or in fact any person, to pay into his own private account cheques which he has endorsed *per pro.* on behalf of another. (See *post*, Chapter 15.)

### Mercantile Agents.

Bankers are frequently brought into contact with a class of agent known as *factors* or *mercantile agents*, who are thus defined by Section 1 of the Factors Act, 1889 :—

(1) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

(2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf.

A **FACTOR** has power to sell goods in his own name, to pledge goods in his possession, to give credit, to receive payments and to give receipts, and to give warranties concerning the goods. He has also a lien on any goods which come into his possession as a factor, as well as an insurable interest in them. It follows, therefore, that a banker can safely deal with a factor provided that the transactions are in good faith, and that he can without risk make advances to the factor upon the security of goods or of documents of title deposited by him.

A **BROKER** is a mercantile agent who is employed to negotiate contracts on behalf of a principal for a compensation called brokerage, as for instance, a stockbroker on a stock exchange, or a produce broker on one of the produce exchanges, or an insurance broker in the insurance market. A broker differs from a factor in that the latter has possession of the goods and may sell in his own name, whereas a broker does not necessarily have possession of the goods or securities which he sells, nor can he act in his own name.

On the completion of a bargain negotiated by a broker he becomes an agent representing both parties to the transaction, his bought and sold contract notes or the signed entry in his book constituting the agreement between the principals.

A DEL CREDERE AGENT is an agent who, usually in consideration of an additional commission, assumes liability to his principal if third persons with whom he enters into contracts on behalf of his principal do not duly perform those contracts. This is not a guarantee within the meaning of the Statute of Frauds, and does not require to be in writing.

## CHAPTER 8

### PARTNERS AND PARTNERSHIPS

THE simplest form of association between individuals with which a banker has to deal is known as a *partnership*, which is defined by Section 1 of the *Partnership Act*, 1890, as "the relation which subsists between persons carrying on a business in common with a view of profit". The persons so associated are described as "partners", the total number of whom is limited by Section 1 of the *Companies (Consolidation) Act*, 1908, to not more than ten if the business is that of banking, and to not more than twenty in the case of any other business having for its object the acquisition of gain. Any such association which consists of more than this prescribed number of persons is illegal unless it is registered as a company under the *Companies (Consolidation) Act*, 1908.

The association of persons acting in partnership is generally known as a "firm", and the name under which the business is conducted is called the "firm-name", in which the partners may sue or be sued at a court of law. The name may consist of an assumed name, or of the names of all or of some of the partners. But if the firm-name does not include the full names of each of the partners, the *Registration of Business Names Act*, 1916, requires that the partnership name must be registered with the Registrar of Joint-Stock Companies, and that the names of all the partners shall be exhibited on every trade catalogue, invoice, circular, business letter, etc., issued by the firm. Furthermore, if any one of the partners is not a natural born British subject, his nationality must be disclosed, or if he has been naturalised, his nationality of origin.

It follows that the firm-name or "style" under which partners conduct business may be anything they like to choose, and it does not matter whether the name upon which they decide has already been adopted by another firm or by other firms (cf. *Limited Companies*, Chapter 9). But a firm may be restrained from using the name of an existing firm if it can be proved that the object is to benefit from the reputation of such firm. The reader may thus conclude that a partnership exists when a business is being conducted under some such name as "Brown Brothers", "Jones and Robinson", "A. J. Herbert & Company", or "The Acme Trading Company."

The use of the word "company" in such titles does not



imply the existence of a joint-stock company incorporated under the Companies (Consolidation) Act, 1908.

### Ordinary and Limited Partnerships.

There are two types of partnership now existing : (a) *Ordinary Partnerships*, which are governed by the Partnership Act, 1890, and (b) *Limited Partnerships*, governed by the Limited Partnerships Act, 1907. The latter type is dealt with in a special section at the end of this chapter, and, unless it is otherwise stated, all other paragraphs in this chapter relate to ordinary partnerships, and the term *partner* used in all paragraphs other than the special section referred to means a *general or ordinary* partner under the Partnership Act, 1890, and not a *limited* partner. It will be made clear in the following pages that this distinction is important.

### The Creation of a Partnership.

No particular formality is required for the creation of a partnership, and although it is always desirable in the interests both of the partners themselves and of the people with whom they transact business that the arrangement should be properly made by deed or written agreement (termed the "*Articles of Partnership*"), a partnership may come into existence like most other contracts by oral agreement or merely in consequence of the conduct of the parties. Even where Articles of Partnership do exist they may be altered at any time with the consent of all the partners, but it is clearly imperative that anyone, such as a banker, who is about to enter into important business relations with a firm, should stipulate for the production of the Articles in order to acquaint himself with their terms, although it should be noted that third parties have no right to inspect these articles, as they have in the case of the articles of a joint-stock company.

As a rule articles of partnership will provide how the business is to be conducted, in what proportions the capital of the firm is to be contributed by the several partners, and how the profits made by the business are to be distributed among the partners. Usually the articles will also define the period over which the partnership is to extend, but if no such period is specified, or if the specified period is exceeded, then the partnership is termed a "*partnership at will*" and may be terminated at any time. When once a firm is constituted, any new partner may be admitted with the consent of all the partners, and it is usual on the admission of a new partner into an old firm to require the incoming partner to pay a *premium*, which may be returnable in whole or in part if the association comes to an end before the expiration of the time fixed.

## Powers of a Partner.

All persons combining to form a partnership must have power to contract according to the ordinary rules of contract law, so that while an infant can be made a partner in a firm, he cannot be held personally liable on any partnership contract. On the other hand, an infant partner can bind the firm and his co-partners by his acts during the continuance of the partnership, in accordance with the provisions regarding the powers of any *general* partner contained in Section 5 of the *Partnership Act*, 1890, which reads as follows :—

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership ; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

From this section it will be seen that a general partner may bind his co-partners by any act within the scope of the ordinary business of the firm, even though the articles of partnership give him no power to do so, provided the person with whom the contract is made deals with the partner as a member of the firm and not as an individual, and is not aware of the absence of authority to bind the firm.

Every ordinary partner is in fact a *general* agent for the firm and his co-partners in all matters relative to the partnership business, and as such, all the ordinary rules of agency apply to his acts. Thus a partner in a trading firm has implied power to buy, to sell or to pledge goods ordinarily dealt in by the firm, to draw, indorse and accept bills of exchange, to draw and indorse cheques, to make and indorse promissory notes, to countermand payment of cheques and to open an account and borrow money on behalf of the firm.

On the other hand, a partner is not entitled to bind the firm by *deed* unless he is empowered to do so by power of attorney ; neither can he in the absence of express authority give a guarantee in the name of the firm (unless it is usual for the firm to give guarantees) nor refer a dispute to arbitration. But the other partners may, if they wish, subsequently ratify any such acts. Again, a partner is not usually empowered to bind the firm by signing an accommodation bill, or by accepting a bill of exchange in blank, although in both cases the firm would be liable to a holder for value taking the instrument without notice of the conditions of signature.

In the case of a *non-trading* firm a partner has no implied authority to do any of the acts here mentioned. Thus a member of a firm of solicitors or doctors has no implied power to accept a bill of exchange, or to borrow money on behalf of the firm, for

such acts are not necessarily within the scope of such business. At the same time, a member of a non-trading firm would apparently have power to draw and indorse cheques in connection with the firm's account at a bank, for such acts are *prima facie* necessary for the conduct of any partnership.

### The Test of Partnership.

It is sometimes very important that third parties should be able to determine whether or not a partnership actually exists between persons who are conducting business together, but it is not always as easy to do this as appears on first sight. Thus it was at one time assumed that any person sharing in the profits of a business could be regarded as a partner, and as such liable for the contracts of the partnership. At the present time, however, although participation in the profits of a business is regarded as strong presumptive evidence of the existence of a partnership, it is not regarded as conclusive, and a person whom it is sought to hold liable on a firm's contracts, may in certain circumstances rebut the presumption that he is a partner in the firm. Furthermore, Section 2 of the *Partnership Act*, 1890, specifically details conditions under which a person may receive a portion of the profits of a business and may, nevertheless, not be a partner, as, for example, in the case of a joint-tenant or a co-owner of property, or of a person who is being paid a debt, remuneration, or annuity out of the profits of a business, or a person who, by contract *in writing*, receives a proportion of the profits in consideration of a loan granted by him to the firm.

As to whether or not a person is a partner depends largely upon the facts of each particular case, but as a general rule it may be stated that a person will be regarded as a partner if it can be shown to the satisfaction of the Court that he has conducted himself as a partner, or that the business has been carried on by persons acting upon his behalf.

### Holding-out as a Partner.

While persons who participate in the profits of a business may thus escape liability as partners in the business, others may render themselves liable as partners although they take no share of the profits. Cases of this kind arise when persons act in such a way as to lead people to suppose that they are partners in a firm. This is described as "*holding-out*" as a partner, and in this regard Section 14 of the *Partnership Act*, 1890, provides:—

(1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on

the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

(2) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors' or administrators' estate or effects liable for any partnership debts contracted after his death.

There is no definite rule as to what legally constitutes "holding-out", and accordingly each case has to be decided upon its merits. The term *nominal partner* is sometimes applied to a person who thus lends his name to a business without having any real interest in it.

### The Implied Rights of a Partner.

In the absence of express agreement to the contrary, every partner (other than a *limited partner*—see below) in a firm is entitled to take part equally with the other partners in the management of the business of the firm, and to share equally in any profits or losses which arise as a result of the conduct of that business. He is also entitled to an indemnity for all payments made or liabilities incurred in the ordinary and proper conduct of the business of the partnership. But in the absence of express agreement, a partner is not entitled to any remuneration for the performance of ordinary partnership duties other than the proportion of profit which is due to him, nor is he entitled to any interest on his capital before the ascertainment of profits, except that he has a right to interest at 5 per cent. per annum upon any payment or advance made by him to or for the business, and beyond the amount which he has agreed to subscribe as a partner.

A partner has also the right to inspect or to take copies of all books of the partnerships, which must be kept at the principal place of business of the firm, and just as no new partner can be introduced into a firm without the consent of all the partners, so a partner cannot be expelled from the firm unless there is an express power of expulsion conferred on the remaining partners by the partnership agreement.

### Liability of Partners.

In this connection, Sections 9-12 of the *Partnership Act, 1890*, read as follows :—

9. Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner ; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so

far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

10. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

11. In the following cases, namely:—

- (a) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and
- (b) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss.

12. Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections.

From these provisions, it will be seen that in England and Ireland a partner is *jointly* liable with his co-partners for all debts of the firm, but he is not liable for any debts contracted before he joined the firm unless he has specifically agreed to be liable, while his liability ceases as to all subsequent debts when he retires, provided in the latter case that he gives express notice by circular, or otherwise, to all persons who have had dealings with the firm, and advises persons who *may* have dealings with the firm by notice in the *Gazette*. Accordingly, while a creditor can sue any one partner, or all the partners together, for the debt due to him, he can bring only one action, and if he obtains judgment against one or some of the partners, the remaining partners who have not been included in the action, are freed from liability even though the creditor's claims may not be satisfied. Furthermore, if a creditor obtains judgment against any of the partners *personally* he cannot enforce it against the partnership property, but if he obtains judgment against the firm or against all the partners together, he can enforce it by issuing execution not only against the partnership property but also against the private estates of the partners.

The general result is, of course, that a creditor can only obtain payment of his debt once. He may choose whether he will proceed against one or some of the partners or against all of them together, but having once determined on his course of action, he must abide by the result although his debt may not be entirely discharged.

Arising out of these rules of law is the fact that although a partner can bind his co-partners *jointly* by signing a joint promissory note (see Chapter 18), he cannot render them *severally* liable even by signing a joint and several note on behalf of the firm, although in the latter case he will make himself liable on

the instrument, i.e., personally liable for its full payment out of his own private estate.

### Novation in Reference to Partnership.

The doctrine of novation implies the substitution of a new party to a contract in place of an original party, and is important in connection with partnership because any change in the constitution of the firm following the admission of a new partner or the death, bankruptcy or retirement of an old one, involves the replacement of the association constituted by the old firm by an entirely new association. It is therefore important that the parties comprising a new firm should definitely take over the liabilities of the old partnership, and expressly obtain the consent of the firm's creditors to the change, for unless this is done a new partner entering the firm cannot be held liable on debts or obligations incurred before his admission.

Similarly, any charge or mortgage over the property of the partnership and any guarantee given by the firm or given by third parties for its benefit will not cover transactions entered into after a change in the firm's constitution, and it is therefore of first importance that upon the happening of such an event steps should be taken to substitute new agreements signed by all the partners in the new firm if they are to be held liable.

### Dissolution of a Partnership.

Apart from express agreement in the Articles of Partnership, Sections 32-34 of the Partnership Act, 1890, provide that :—

32. Subject to any agreement between the partners, a partnership is dissolved—

- (a) If entered into for a fixed term, by the expiration of that term;
- (b) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking;
- (c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

33. (1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

(2) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

34. A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

In addition to the foregoing, Section 35 provides that the Court may, on application by a partner, decree a dissolution in certain other cases, as for example, when a partner is found lunatic by inquisition, or is proved to be of unsound mind or to be incapable of performing his part of the agreement, or when he has been guilty of a criminal offence or wilful misconduct.

Upon dissolution, every partner is entitled to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have any surplus assets after such payment applied in payment of what may be due to the partners respectively, after deduction of what may be due from them as partners in the firm.

If, on the *death* of a partner, it becomes necessary to wind up the partnership business, the surviving partners have complete powers to do all acts necessary for the winding up, and can apply for this purpose any property or funds belonging to the firm, as, for example, the balance on an account with a banker. But although the deceased's estate is liable for any debts contracted during his lifetime, it cannot be held liable for debts or obligations incurred after the date of death, even though the creditor was not aware of the latter at the time of contracting with the firm. On the other hand, the representatives of the deceased have no power to bind the firm or to interfere in its affairs.

Similar conditions apply in the case of *bankruptcy* of a partner. Neither he nor the trustee has any right to interfere with the affairs of the firm, while the bankrupt's estate cannot be held liable for any debts contracted by the firm after the commencement of the bankruptcy. It is to be noted also that while the bankruptcy of a partnership involves the bankruptcy of every member of the firm, the bankruptcy of a partner does not necessarily involve the bankruptcy of the firm or of his co-partners. Consequently, if it is provided in the articles of partnership that the bankruptcy of a partner shall not dissolve the firm, the solvent partners may continue the business, subject, of course, to their satisfying the claims of the bankrupt partner's trustee regarding the bankrupt's share of the partnership assets and accruing profits.

As already stated, the bankruptcy of a partnership involves the bankruptcy of each of the partners. In such a case the partnership property is described as a *joint estate*, while the private estates of the partners are referred to as the *separate estates*. The funds received from the realisation of the joint estate are applied first of all in payment of the partnership debts, while the proceeds of the realisation of the separate estates are applied to discharge the debts of the individual partners. Any surplus from the joint estate is divided amongst the separate estates according to the respective interest of each partner,

while any surplus from the separate estates is credited to the joint estate.

### Limited Partnerships.

*The Limited Partnerships Act, 1907*, provided for a new type of association called a *Limited Partnership*, to consist of not more than *twenty* members (or *ten* in the case of a banking business), in which the liability of *certain* of the members can be limited to the amount of capital each has contributed to the firm, provided that there is at least one general or unlimited partner, i.e., one who, as in the case of an ordinary partnership, is liable to the full extent of his separate estate for the debts of the partnership.

Complete particulars of all limited partnerships must be registered with the Registrar of Joint-Stock Companies and the register kept up to date, otherwise such a concern will be regarded as an ordinary partnership in which the liability of the members is unlimited. The fact that a partnership is limited need not, however, be disclosed in its business, neither is it necessary for a reference to be made to the fact in the firm's name or literature.

It is important, however, that a banker or other person lending money to a firm should make full enquiries as to whether the firm is or is not a limited partnership, otherwise such persons may find that they have been led to grant credit to the firm on the strength of the association therewith of one or more men of means and reputation, who may turn out to be merely limited partners with a comparatively small stake in the business. On the other hand, the public are entitled at any time to inspect the register of limited partnerships kept by the Registrar of Joint-Stock Companies, and if there is any doubt about the matter, or if the necessary information is not given by the partners, anyone having important financial or business dealings with a firm would be well advised to take this precaution in order to determine whether the interest of any of the partners is limited.

A limited partner differs from an ordinary partner in several important respects. Thus he must not take part in the management of the firm, otherwise he will become liable as a general partner for all debts and obligations of the firm contracted while he so takes part in the management. He may, however, inspect the partnership books and advise upon the state and prospects of the business. During the existence of the partnership he may not draw out or receive back any part of his contribution to the capital of the firm, although he may assign his share if the general partners agree. Furthermore, neither the death, bankruptcy or insanity of a limited partner dissolves the partnership, although the lunacy of such a partner will be ground for dissolution if



his share cannot otherwise be ascertained and realised. On the dissolution of a limited partnership its affairs are wound up by the general partners, unless the Court otherwise orders. If, however, the firm itself or the general partners become bankrupt, the assets of the firm vest in the trustee in bankruptcy as in the case of ordinary partnerships.

## CHAPTER 9

### IMPERSONAL CUSTOMERS

THERE is little doubt that from a banker's point of view the greatest difficulties arise and the greatest care is necessary in dealing with customers of the class which we have described as *impersonal*, comprising various types of association, societies, corporations and companies, regarded by law as having a legal existence quite apart from the individuals by which they are constituted, and who have power to contract and transact business in the name of the organisation. In the eyes of the law bodies of this kind are regarded as *legal persona*, or "*artificial*" persons, and they are perpetual in the sense that they are unaffected by the death, bankruptcy or insanity of the individuals who, for the time being, are in charge of their affairs or constitute their membership. The necessity for ensuring this perpetual succession was, in fact, the principal reason for the creation and recognition of such bodies, as is clearly explained in the following terms by Sir William Blackstone in his *Commentaries on the Laws of England*. "As all personal rights die with the person, and as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient if not impracticable, it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. These artificial persons are called bodies politic, bodies corporate (*corpora corporata*), or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce, in order to preserve entire and for ever those rights and immunities which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct".

Bodies corporate are said to be either "*corporations sole*", or "*corporations aggregate*", according as they consist of only one "*corporator*" or member, or of more than one. Examples of the former are the King, a bishop or the vicar of a parish, each of whom is regarded by law as a legal personality having rights and liabilities quite distinct from those of the individual person for the time being constituting the corporation sole. Thus the King has a right to the royal palaces and royal domains during his lifetime, but from the moment of his death they vest automatically in his successor.

For our present purpose corporations sole are not of great importance, and accordingly attention will be directed primarily to corporations aggregate, of which the joint-stock company is the most common example.

Difficulties arise in transacting business with such bodies because, although they may be vested with wide legal powers, they cannot possess the same physical attributes as a natural person. A corporate body is inanimate; it cannot marry or die or suffer imprisonment, but must think and act through the agency of natural persons who direct its affairs. Moreover, it is clearly imperative for the benefit of the community generally that the powers and manner of contracting of such bodies should be strictly defined by law, and it is therefore very necessary that anyone entering into important business relations with such corporations should have at least some knowledge of their constitution, powers, and manner of contracting.

In the following paragraphs an attempt is made to outline the important features and powers of the principal types of impersonal association with which a banker has to deal in the course of his business, but it must be understood that the explanation is necessarily very brief, and accordingly any reader desiring further details should refer to the statutes and sources mentioned in the discussion.

## JOINT-STOCK COMPANIES

The principal type of impersonal customer or corporation aggregate with which a banker has to deal is that known as a *joint-stock company*, described by Lord Lindley as "An association of many persons who contribute money or money's worth to a common stock and employ it in some trade or business, and who share the profit and loss (as the case may be) arising therefrom. The common stock so contributed is denoted in money and is the capital of the company. The persons who contribute it, or to whom it belongs, are members. The proportion of capital to which each member is entitled is his share".

A joint-stock company may be formed, or as it is termed, *incorporated*, in three ways (a) *by Royal Charter*, as in the case of the Bank of England (see *ante*, page 22) and the British South Africa Company; (b) *by Special Statute*, as in the case of all our railway companies, the Manchester Ship Canal Company and most electric lighting and tramway companies; and (c) *by Registration under the Joint-Stock Companies Acts*. The last class is by far the most important for our present purpose, and includes companies registered under the various Acts from the original Joint-Stock Companies Act, 1844, to the Companies (Consolidation) Acts, 1908-17, which consolidated and codified the existing law relating to joint-stock companies, and are usually referred to collectively as the "Companies Acts".

### Types of Registered Joint-Stock Companies.

There are three types of registered joint-stock company : (a) *Unlimited Companies*, an extremely rare type in which the liability of each member for the debts of the concern is unlimited, as in the case of ordinary partnership, but having the advantage over a partnership in the fact that the liability ceases at the end of one year from the date on which membership is terminated ; (b) *Companies Limited by Guarantee*, also comparatively rare, in which each member guarantees to contribute a fixed amount to meet the liabilities of the company while he remains a member and for one year afterwards ; (c) *Companies Limited by Shares*, by far the largest and most important type and the one with which we shall be chiefly concerned in the following paragraphs, in which the liability of each member is limited to the amount unpaid on the shares held by him.

Limited companies may be either *public* companies or *private* companies. A public limited company must consist of at least *seven* members, but a private company may be formed by *two* persons only. A public company is usually brought into being by a promoter or promoters, who interest the requisite number of persons in the business which it is proposed to conduct, take all the necessary measures to bring the corporation into being, and arrange for a public offer of shares to be made, i.e., the public are invited by newspaper advertisements and in other ways to apply for shares in the new concern. On the other hand, a private company is usually formed from an existing business, and enjoys certain privileges to keep its affairs private in return for (a) restricting the right to transfer its shares ; (b) limiting the number of its members (exclusive of past or present employees) to fifty ; and (c) prohibiting any invitation to the public to subscribe to its capital.

### The Memorandum of Association.

When those responsible for bringing a company into being have obtained the necessary number of members, a document known as a *Memorandum of Association* is drawn up and signed by the requisite number of subscribers. The Memorandum of Association has been referred to by a famous judge as "the charter or fundamental law of a company". It defines the company's powers, sets forth its objects, controls its external operations, and is in fact the constitution of the company so far as the outside world is concerned.

Section 3 of the *Companies (Consolidation) Act*, 1908, provides that in the case of a company limited by shares the Memorandum must state (a) the name of the company with "Limited" as the last word in its name ; (b) the part of the United Kingdom—whether England, Scotland or Ireland—in which the registered

# SPECIMEN FORM OF MEMORANDUM OF ASSOCIATION

THE COMPANIES (CONSOLIDATION) ACT, 1908

Company Limited by Shares

## MEMORANDUM OF ASSOCIATION

OF

### THE SOUTHERN TRADING COMPANY, LIMITED

1. The name of the Company is "THE SOUTHERN TRADING COMPANY, LIMITED".
2. The registered office of the Company will be situate in England.
3. The objects for which the Company is established are:—
  - (a) To acquire and take over as a going concern the business and all or any part of the assets and liabilities of the firm of Jones and Smith, of 14 Broad Street, Bristol, and with a view thereto, to adopt the agreement referred to in Clause 3 of the Company's Articles of Association, and to carry the same into effect with or without modification.
  - (b) To carry on business as importers, exporters, merchants and manufacturers of soaps, candles, and all kinds of oleaginous substances, fats, greases, and perfumes, and to buy, sell, manufacture and deal in commodities of all kinds which can conveniently be dealt in by the Company in connection with any of its objects.
  - (c) To carry on any other business, whether manufacturing or otherwise, which may seem to the Company capable of being conveniently carried on in connection with any of the above specific objects, or calculated to enhance the value of or render profitable any of the Company's property or rights.
  - (d) To acquire and undertake all or any part of the business, property and liability of any person, firm or company carrying on business which the Company is authorised to carry on, or possessed of property suitable for the purposes of this Company.
  - (e) To enter into partnership or into any arrangement for sharing profits, union of interest, reciprocal concessions, or co-operation with any person or company carrying on or about to carry on any business which this Company is authorised to carry on, or any business or transaction capable of being conducted so as to benefit this Company, and to acquire and hold shares or stock in or securities of, and to subsidise or assist any such company, and to sell, hold or otherwise deal with such shares or securities.
  - (f) To borrow or raise and secure the payment of money in such manner as the Company shall think fit, and in particular by the issue of debentures or debenture stock, perpetual or otherwise, charged upon all or any of the Company's property, including its uncalled capital, and to purchase, redeem or pay off any such securities.
  - (g) To draw, make, accept, indorse, discount, execute and issue bills of exchange, promissory notes, bills of lading, warrants, debentures and other negotiable or transferable instruments.
  - (h) To sell the undertaking of the Company, or any part thereof, for such consideration as the Company may think fit, and in particular wholly or partly for shares, debentures, debenture stock, or securities of any other company, and to accept and take any such shares, stock, debentures or securities in satisfaction of any money payable to or any claim of, the Company.
  - (i) To do all such things as are incidental or conducive to the attainment of any of the above-mentioned objects.
4. The Liability of the members is limited.
5. The capital of the Company is £1,000,000, divided into 1,000,000 shares of £1 each.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a Company in pursuance of the Memorandum of Association, and we respectively agree to take the number of shares in the capital of the Company set opposite to our respective names.

NAME, ADDRESS AND DESCRIPTIONS OF SUBSCRIBERS.	NUMBER OF SHARES TAKEN BY EACH SUBSCRIBER.
JOHN JONES, 14 Broad Street, Bristol, Merchant . . .	One
FRED. SMITH, 14 Broad Street, Bristol, Merchant . . .	One
THOMAS GREEN, 23 Abbey Road, Cardiff, Surveyor . . .	One
ANDREW RAY, 200 Highland Avenue, Glasgow, Solicitor . . .	One
FRANK JAMES, 78 Mayfair Road, Bristol, Clerk . . .	One
JAMES WATTS, The Hollies, Lincoln, Town Clerk . . .	One

Dated this 1st day of January, 19....

Witness to all the above Signatures—

JOHN DREW,

Melbourne Chambers,  
Bristol.

Solicitor.

office of the company is to be situate; (c) the objects of the company; (d) that the liability of the members is limited; (e) the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount. The Memorandum concludes with the "*Association Clause*", a signed declaration by the persons whose names, addresses and descriptions are given, that they are desirous of being formed into a company, and each of such subscribers is required by Section 3 to write opposite his name the number of shares which he takes, such number not being less than *one* share for each subscriber.

The company may adopt any name which it chooses so long as it does not too closely resemble that of any existing company and provided that the name ends with the word "*Limited*". The name may not be changed except by a special resolution of the shareholders in general meeting and with the sanction in writing of the Board of Trade.

In order to ensure adequate publication of the name of a company, Section 63 of the *Companies (Consolidation) Act* provides that the name shall be clearly displayed outside every office or place in which the business is conducted, and that it shall appear on the company's seal, in all notices, advertisements, and other official publications of the company, and on all bills of exchange, cheques and notes, orders, invoices and similar documents issued or signed on behalf of the company.

The third requirement of the Memorandum, referred to as the "*Objects Clause*", is of vital importance, for the company can exist only for the objects which are set forth in this clause, and any act done by the company or its directors outside the powers therein specified will be null and void, or, as it is called, *ultra vires*, i.e. beyond the powers of the company and not binding upon it. It is, therefore, usual for those promoting a new company to make the objects clause as wide as possible, so that the company may at any time extend its powers as it may deem necessary for its business without having to go to the trouble and expense of passing a special resolution to alter this clause, and applying to the Court for confirmation of the alteration.

### The Articles of Association.

In addition to the Memorandum, it is usual for those promoting a company to draw up what are known as the company's *Articles of Association*. These consist of a series of regulations governing the *internal* management of the company, and form a contract between the company and its members, defining their respective and relative rights and duties. Thus the Articles usually contain regulations concerning such matters as the appointment and powers of directors, the borrowing powers of

the company, shares and share certificates, meetings of the shareholders, voting powers of the members and the method of passing resolutions. But in all such matters the Articles are subject to the Memorandum, and they cannot confer or include any powers beyond those contained in the Memorandum.

The Articles of a joint-stock company must be printed, arranged consecutively in paragraphs, and stamped as a deed. They must be signed by the subscribers to the Memorandum in the presence of a witness, and the signatures must be duly attested by the signature of the witness. When once they are thus completed and after registration (see below), they cannot be altered except by special resolution of the company in general meeting, and then, of course, the Articles as altered must not go beyond the Memorandum.

It is not essential that a company should have its own Articles, and if it has not, or in so far as its own Articles may be incomplete, then it will be deemed to have adopted the model form of Articles contained in the first Schedule of the Companies (Consolidation) Act, 1908, and known as *Table A*.

### Registration of a Joint-Stock Company.

When the Memorandum and Articles are complete the company is in a position to become registered. Accordingly, duly stamped copies of the documents, together with the necessary registration fees, are forwarded to the Registrar of Joint-Stock Companies. In addition, five other documents must be sent, viz. :—(a) A list of persons who have consented to become directors, giving their nationality; (b) In the case of a public company, a written consent of such directors to act; (c) A statutory declaration that the requirements of the Companies Acts have been complied with; (d) A statement of the nominal capital; and (e) A notice of the situation and postal address of the registered office.

### The Certificate of Incorporation.

When the Registrar is satisfied that the documents are in order, he issues a *Certificate of Incorporation*, which is conclusive evidence of the registration of the company and of its compliance with all the necessary formalities. Only when this certificate is issued can the company be regarded as having actually come into legal existence, consequently any person making important contracts with a company—as, for example, by advancing it money—should not only be satisfied that the Certificate of Incorporation exists, but should usually insist upon inspecting it. If such a certificate has not been issued, any contracts—including loans of money—made with a supposed company are

void and of no legal effect, so that no action thereon can be taken against the company even if it subsequently becomes registered and obtains a Certificate of Incorporation.

No. 18976.

**CERTIFICATE OF INCORPORATION.**

I hereby Certify that *The Southern Trading Company, Limited*, is this day Incorporated under the Companies Acts, 1908 to 1917, and that the Company is *Limited*.

Given under my hand at London this *first* day of *January*, One thousand nine hundred and..... Fees and Deed Stamps £52 : 10 : 0.

Stamp Duty on Capital, £10,000 : 0 : 0.

*James Brown,*  
REGISTRAR OF JOINT-STOCK COMPANIES.

Once the certificate is issued, any person thereafter dealing with the company is deemed to have notice of the contents of its Memorandum and Articles, for the Register and the actual documents may be inspected by anyone upon payment of a small fee, while members of the company can demand copies of the Memorandum and Articles at a fee not exceeding one shilling.

Accordingly, any person entering into important contracts with the company after its incorporation will do so at his own risk if he has not taken steps to ascertain the powers of the company and of its directors. This is a most important provision, particularly from the point of view of bankers and others advancing money to a company, for the law will not protect them if they make loans to a company or to its directors, without, first of all, satisfying themselves concerning the borrowing powers both of the company itself and of its directors on its behalf.

**The Certificate to Commence Business.**

Moreover, in the case of a *public* company, it cannot exercise borrowing powers or commence business until it has complied with the requirements of Section 87 of the *Companies (Consolidation) Act, 1908*, which provides that: (a) the minimum subscription (if any) upon which the directors may proceed to allot shares to applicants must have been subscribed; (b) each director must have paid on each share that he is liable to pay for in cash, the same amount as members of the public must pay on application and allotment; (c) a statutory declaration must have been filed that the aforesaid conditions have been complied with; and (d) a prospectus, or, if no prospectus has been issued, then a statement in lieu thereof must have been filed with the Registrar of companies.

When the Registrar is satisfied that these provisions have



been complied with he will issue to the company concerned a *Certificate to Commence Business*, or as it is commonly called, a *Trading Certificate*, upon receipt of which—but not before—the company is entitled to commence its operations or to carry out the objects for which it was incorporated. The following is a specimen of this certificate:—

No. 17326.

**CERTIFICATE UNDER S. 87 (2) OF THE COMPANIES  
(CONSOLIDATION) ACT, 1908.**

**THAT A**

**COMPANY IS ENTITLED TO COMMENCE BUSINESS.**

I HEREBY CERTIFY that *The Southern Trading Company, Limited*, of 117 Lombard Street, London, E.C., which was incorporated under the Companies (Consolidation) Act, 1908, on the first day of January, 19.., and which has this day filed a statutory declaration in the prescribed form that the conditions of Section 87 (2) have been complied with, is entitled to commence business.

Given under my hand at London this 2nd day of February, one thousand nine hundred and.....

*James Brown,*

REGISTRAR OF JOINT-STOCK COMPANIES.

Many students confuse the Certificate of Incorporation with the Certificate to Commence Business, but it will be seen from the foregoing explanation that they are two entirely distinct documents. The former recognises the company as a legal entity or *persona*, but until the latter certificate is issued, a public company is an entity or *persona* without power to act, and, from a banker's point of view what is very important, without power to borrow money or to give securities to cover any such borrowings.


It is important to remember also that a certificate to commence business is not required in the case of a *private* company, which is at liberty to begin operations as soon as it has been granted a certificate of incorporation by the Registrar.

### Members and Their Shares.

Persons become members of a joint-stock company either by subscribing to its Memorandum or by having their names put on the company's register of members in consequence of (a) their having subscribed for any of its shares offered to the public, or (b) their having purchased its shares in the open market, or (c) their having become entitled to shares through the death of a member.

*The Register of Members*, containing particulars of the names,

addresses, and occupations of all the shareholders, is kept at the registered office of the company, where it may be inspected by any member without payment or by a non-member on payment of one shilling. No notice of any trust can be entered on this register, so that if a trustee of certain shares is put on the register he becomes personally liable as a shareholder for any calls which may thereafter be made. (See below.) Furthermore, a company will not recognise any charge over its shares by a third party, although if notice of such a charge is given, as, for example, by a banker who has granted an advance to a customer against deposit of share certificates, the charge of the person giving the notice will take precedence of any charge *subsequently* created in favour of the *company* by the shareholder. Thus the Articles usually give the company a *lien* over the shares of any of its members in respect of debts due by such members to the company, the lien being enforceable if necessary by sale of the shares with the right to claim and apply the proceeds. Such a lien is unaffected by any notice that a third party has an interest in the shares, but the notice is useful in that, although the existing lien is not affected, any advances made by the company to the shareholder subsequent to receipt of notice of the third party's interest will not obtain priority over that interest.

SHARE CERTIFICATE		
<b>THE SOUTHERN TRADING COMPANY, LIMITED</b>		
<small>INCORPORATED UNDER THE COMPANIES ACTS, 1908 &amp; 1917</small>		
<small>Certificate No.</small> 172	<b>CAPITAL</b> . . . . .	<b>£1,000,000</b>
	<small>Divided into 1,000,000 Shares of £1 each</small>	<small>No. of Shares</small> 200
<p>THIS IS TO CERTIFY that <i>James Brown, Esq.</i>, of 17 North Avenue, North-town, is the Registered Proprietor of Two hundred Fully paid-up Shares of £1 Sterling each, Nos. 100 to 299 inclusive, in <i>The Southern Trading Company, Limited</i>, subject to the Articles of Association and Regulations of the Company.</p> <p>GIVEN under the Common Seal of the Company, this 29th day of January, 19...</p>		
	<p><i>James White,</i> } DIRECTORS. <i>A. B. Jenkins,</i> } <i>Thomas Robinson,</i> SECRETARY.</p>	
<p>NOTE.—No Transfer of any of the Shares comprised in this Certificate will be registered until the Certificate is deposited at the Company's Office.</p>		

The proportion of capital to which each member is entitled by virtue of his holding of shares in a company is described as his "share capital". In respect of this he is entitled to a "*share certificate*", setting forth particulars of his holding, and also to receive such dividends or distributions of capital as may be made

from time to time by the company in accordance with its Memorandum and Articles. A shareholder may freely transfer his shares, subject to any restrictions contained in the Articles, such transfer being effected by an instrument in writing, or by deed if the Articles so prescribe. The person to whom shares are transferred is called a "transferee", and upon registration of the transfer in the company's books he becomes a shareholder, and as such is entitled to a certificate as evidence of his holding. If a shareholder transfers only a part of his holding, *two* new certificates are issued in place of the old certificate, one to the original shareholder and one to the transferee. A person may become entitled to shares otherwise than by transfer, as for example, in the case of an executor or administrator, who as the personal representative of a deceased shareholder can demand to have his name entered on the register as owner of the deceased's shares, upon the production to the company of the probate of the will or the letters of administration, as the case may be. This is described as the *transmission* of shares as distinct from transfer, and arises also on the bankruptcy of a shareholder, when his shares automatically vest in the trustee in bankruptcy.

### The Annual Summary.

Every year a company is required to compile and send to the Registrar of joint-stock companies a statement known as an "*Annual Summary*", giving among various other items, full particulars of every member with details of that member's holding of shares, the names and addresses of its directors, and (except in the case of a *private* company) a statement in the form of a balance-sheet, signed by at least two directors of the company and certified in an attached report by the company's auditors.

### Calls on Shares.

From a banker's point of view it is particularly important to recognise that shares in a company are not always fully paid up, and if only a certain proportion of the nominal value of each share has been paid in cash by each shareholder, the directors have the right, subject to the Articles, to call up the proportion remaining unpaid at any time provided the call is made in the interests of the company. Thus the £1 shares in a company may be only 10s. paid up, and the person holding them for the time being is liable at any time to be called upon to pay the balance. Moreover, from a banker's standpoint it is the *market* value of shares deposited as security with which he is primarily concerned, and, other things being equal, the actual market value of partly paid-up shares is relatively not as great as that of shares in respect of which the whole of the capital has been paid up.

## Debentures.

Companies frequently borrow money for the purpose of their business by the issue of *debentures*, which usually take the form of a deed under the company's seal, stamped with *ad valorem*

### MORTGAGE DEBENTURE TO BEARER

## The Southern Trading Company, LIMITED

*Incorporated under the Companies Acts, 1908 and 1917*

No. 108

£100

Registered Office: 117 LOMBARD STREET, LONDON, E.C.

Issue of £100,000 First Mortgage Debentures to Bearer

In 1000 Debentures of £100 each

CARRYING INTEREST AT THE RATE OF SEVEN PER CENT. PER ANNUM.

### DEBENTURE

1. THE SOUTHERN TRADING COMPANY LIMITED (hereinafter called "the Company") will, on the 1st day of December, 19.., or on such earlier day as the principal monies hereby secured become payable in accordance with the conditions endorsed hereon, pay to the Bearer on presentation of this Debenture the sum of One Hundred Pounds.

2. The Company will, in the meantime, pay interest thereon at the rate of 7 per cent. per annum, by equal half-yearly payments on every 1st day of June and 1st day of December, in accordance with Coupons annexed hereto.

3. The Company doth hereby, as beneficial owner, charge with such payment all its present and future capital stock, including uncalled capital, goods, chattels and effects, and all its real and leasehold property and interest in lands; and also all its book and other debts, goodwill, rights and assets, and generally all the present and future property, real and personal, and undertakings of the Company, including its uncalled capital for the time being, all of which premises of every kind above specified are intended to be included in the term "property", wherever used herein.

4. This Debenture is issued subject to and with the benefit of the Conditions endorsed hereon, which are to be deemed part of it.

*Given under the Common Seal of the Company,  
the 7th day of June, 19..*



James White, } DIRECTORS.  
A. B. Jenkins, }  
Thomas Robinson, SECRETARY.

[The Conditions relating to the Security appear on the back.]

duty, and containing a promise by the company to repay the money lent with interest thereon, subject to certain specified conditions. Debentures may be payable to *bearer*, in which case they are regarded as negotiable instruments transferable by

delivery, or they may be *registered* debentures, i.e., payable to a registered holder, in which case they are usually transferable by deed. As a rule, interest on the former is paid against the submission to the company or its bankers of "*coupons*" detached from the debenture, while, in the case of registered debentures, interest is usually paid by warrant to the registered holder.

Usually, a debenture gives the lender as security for the loan a charge or mortgage over some specific part or all of the property of the company, in which case it is described as a "*mortgage debenture*", and must be registered with the Registrar of joint-stock companies. Sometimes, however, a debenture is merely a promise to repay money borrowed and does not give any charge over the company's property, in which case it is referred to as a "*naked debenture*". When a debenture contains a charge over *specific* property of the company it is usual for the property so charged to be conveyed by way of mortgage to trustees for the benefit of the debenture holders, the *trust deed* containing the terms upon which the issue of debentures is made and having the effect of debarring the company from dealing with the property charged in the ordinary way of its business.

### Floating Charges.

In the absence of a trust deed specifically mortgaging some or all of the property as security for the loan, the debenture usually gives the lender what is called a "*Floating Charge*" over the company's property, such a charge permitting the company to deal with any of its assets in the ordinary course of its business so long as it is a going concern, and so long as the charge does not become "*fixed*" or "*crystallised*". The charge is said to become fixed when the money secured by the debenture becomes immediately repayable in accordance with the terms of the instrument, as for example, when the company makes default in the payment of interest or when an order is passed or made for the winding-up of the company. Unless it can be shown that immediately after the creation of the charge the company was solvent, any charge of this kind which is created within three months of the commencement of the winding-up of the company (see page 151) is invalid, except in so far as concerns the amount of cash received by the company in consideration for the charge, at the time of or subsequent to its creation, together with interest thereon at 5 per cent. per annum.

### Register of Mortgages and Charges.

In order to secure ample publicity regarding mortgages and charges created by a joint-stock company, Section 93 of the

*Companies (Consolidation) Act, 1908*, provides in the following terms for the registration of such charges :—

Every mortgage or charge created after the first day of July nineteen hundred and eight by a company registered in England or Ireland and being either—

- (a) a mortgage or charge for the purpose of securing any issue of debentures; or
- (b) a mortgage or charge on uncalled share capital of the company; or
- (c) a mortgage or charge created or evidenced by an instrument, which, if executed by an individual, would require registration as a bill of sale; or
- (d) a mortgage or charge on any land, wherever situate, or any interest therein; or
- (e) a mortgage or charge on any book debts of the company; or
- (f) a floating charge on the undertaking or property of the company,

shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable.

Upon registration, a certificate is issued by the Registrar, which is conclusive evidence of compliance with the requirements of this section, and a copy thereof must be endorsed on any debentures or certificate of debenture stock issued in respect of the charge.

The section further provides that it shall be the duty of the Company itself to effect the registration, but in default thereof any person interested may register the necessary particulars, provided that he does so within twenty-one days of the creation of the charge. Moreover, the company is required to keep at its registered office a copy of every instrument creating a charge which requires registration under this section.

In addition to the foregoing, every joint-stock company is required by Section 100 to maintain an up-to-date register of all charges *specifically* affecting its property, i.e., all charges other than floating charges. These provisions are as follows :—

(1) Every limited company shall keep a register of mortgages and enter therein all mortgages and charges specifically affecting property of the company, giving in each case a short description of the property mortgaged or charged, the amount of the mortgage or charge, and (except in the case of securities to bearer) the names of the mortgagees or persons entitled thereto.

(2) If any director, manager, or other officer of the company knowingly and wilfully authorises or permits the omission of any entry required to be made in pursuance of this section, he shall be liable to a fine not exceeding fifty pounds.

The mere omission to register a mortgage or charge which ought to be registered in accordance with the above section, does not invalidate such mortgage or charge—*Wright v. Horton* (1887).

No person can complain of being unaware of the existence of such charges over a company's property, for the public register is open to inspection by any person on payment of a fee, while the register kept by the company must be available for inspection free of charge by any member or creditor of the company, and by any member of the public on payment of a small fee.

### **Power to Issue Debentures.**

It is particularly important to notice that not every company has power to issue debentures, for although a trading company has implied power to borrow and therefore to issue debentures as security for its loans, a non-trading company has no such right unless its Memorandum gives it express power in this regard. Furthermore, even in the case of a trading company the borrowing powers may be strictly limited by provisions in the Memorandum, and in all cases if the prescribed limit is exceeded, or if no power exists, then the transaction will be null and void and any security given inoperative against the company. The remedy left to the lender in such circumstances is that he is "subrogated" to the rights of the creditors or other persons who have been paid with the funds borrowed, i.e., he may "stand in the shoes" of those who have benefited in money by reason of his having granted the advance, but this right does not entitle him to any securities or priorities of any creditors so discharged.

Moreover, the lender may sue the directors personally for breach of warranty of authority, or to recover the money from them if it can be identified and has not been so used in the company's business that it cannot be followed.

### **The Powers and Duties of the Directors and Secretary.**

The directors of a company are persons chosen from amongst its members to manage the property and business of the company in the interests of its shareholders. As a rule, the first directors of a company are named in its Articles, otherwise they are appointed by the subscribers to the Memorandum. Subsequent directors are appointed by the shareholders in general meeting.

The directors act on behalf of the company as its *agents*, subject to such powers as are conferred upon them by the Articles, and subject to the general powers of the company specified in its Memorandum. The actions of directors are thus subject to the ordinary rules of agency which we have already discussed. (See *ante*, Chapter 7.) They must carry out their duties in an efficient manner and account to the company for all

profits which they make in the course of its business. Furthermore, the company is not bound by any act of a director which is beyond the powers of the company as stated in its Memorandum, for such an act is *ultra vires* and void.

If, however, a director contracts beyond the powers conferred upon him by the Articles, but *not* beyond the powers of the company as stated in its Memorandum, then the company will be bound if the third party had no notice of the director's want of authority, while the director himself is personally liable to an action for damages for breach of an implied warranty of authority. Thus, directors who exceed their authority in borrowing money from a banker or other person ostensibly on behalf of the company, render themselves liable to an action, provided that the lender acts in good faith and without notice of the absence of authority. At the same time the company will be liable for the advance if the borrowing of money is expressly or impliedly within its powers, and the loan is not, on the face of it, inconsistent with limitations imposed by the Articles upon the authority of the directors.

In addition to being agents of the company, directors are also regarded as *trustees* for the members in relation to such matters as allotting and issuing shares, debentures, and stock, making calls, and passing transfers of shares. Their duty is to act in absolute good faith towards all the members, and, both as trustees and agents, not to use their position to secure any personal gain at the expense of the general body of shareholders.

The powers and duties of the secretary are those of a mere servant or officer of the company, paid to carry out the instructions of the directors operating as a board in the interests of the company. The company is not as a rule bound by any acts of the secretary in excess of the powers with which he is expressly invested. The position of a secretary is "that he is to do what he is told, and no person can assume that he has any authority to represent anything at all; nor can anyone assume that statements made by him are necessarily to be accepted as trustworthy without further inquiry, any more than in the case of a merchant it can be assumed that one who is only a clerk has authority to make representations to induce persons to enter into contracts".<sup>1</sup>

At the same time, a secretary, as an important official of a company, may render himself liable to statutory penalties if he does not in the course of his duties comply with certain requirements of the Companies Acts.

### The Signing of Bills, Notes, and Cheques on behalf of a Company.

The most frequent difficulties concerning the personal liability of directors in respect of contracts made by them on the com-

<sup>1</sup> Lord Esher, M.R., in *Barnet v. South London Tramways Company*, 1887.



pany's behalf arise in connection with the signing of negotiable instruments, and particularly bills of exchange, promissory notes, and cheques. In regard to these, Section 77 of the *Companies (Consolidation) Act, 1908*, provides :—

A bill of exchange or promissory note shall be deemed to have been made, accepted, or indorsed on behalf of a company if made, accepted, or indorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority.

So far as third persons are concerned, the phrase "*any person acting under its authority*" is capable of a wide interpretation, for in accordance with the *Rule in Turquand's Case*, an outside person without notice to the contrary is entitled to assume that any official of the company, as, for example, a managing director, who under the company's constitution may reasonably be expected to have power to sign bills of exchange or promissory notes on its behalf, actually has such power. The company will be liable to such person even if the official was acting without actual authority.

Nevertheless, a director or any such person signing negotiable instruments on a company's behalf will be personally liable thereon unless he makes it sufficiently clear that he is acting merely as an agent for the company and not with the intention of incurring personal liability. Accordingly, it is usual for the director or secretary of a company signing on its behalf to sign in one of the following forms :—

<p><i>For The White Company, Ltd.,</i> Abel Jones, Director.</p>	<p>or</p>	<p><i>For and on behalf of the X.L. Company, Ltd.,</i> Andrew Wills, Secretary.</p>
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But the use of the words "for", "on account of", or "on behalf of", are not essential, for the form of the signature *and the circumstances of the case* may clearly indicate that the signer means to bind the company and not himself personally. An illustration of this occurred in the case of *Chapman v. Smethurst, 1909*, where a managing director who had signed a promissory note in the following form was held *not* to be personally liable on the instrument :—

Six months after demand I promise to pay to Mrs M. Chapman the sum of £300 for value received, together with six per cent. interest per annum.

J. H. Smethurst's Laundry  
and Dye Works, Limited.,

J. H. Smethurst,  
Managing Director.

On the other hand, in *Landes v. Marcus, 1909*, it was held that two directors were personally liable where they had signed a cheque at the foot in the following form, the secretary's signature being omitted, and the name of the company appearing only at the top of the instrument :

*B. Marcus, Director.*  
*S. H. Davids, Director.*  
\_\_\_\_\_, Secretary.

Again, in *Elliot v. Bax-Ironside*, 1925, an endorsement was placed on the bill by way of security, not as the discharge of the payee or endorsee, and was in the following form :—

Fashions Fair Exhibitions, Ltd.

H. O. Bax-Ironside, }  
 Ronald A. Mason, } Directors.

The circumstances of the case showed that the plaintiff had specifically requested the endorsement of the directors, as he was not fully satisfied with the liability of the company itself in respect of its acceptance. Accordingly, the Judge held that there was a clear intention *in the circumstances* to hold the directors personally liable, and the company was not bound.

This case does not necessarily decide that some such words as "For" or "Per Pro" or "For and on behalf of" are essential. In fact, there is no legally prescribed form of drawing or endorsing bills, and the mere name of a company written or stamped on a bill by a person actually so authorised will be sufficient to bind the company. Nor does the decision necessarily conflict with that in *Chapman v. Smethurst*, quoted above, for the guiding principle followed is that contained in Section 26 of the Bills of Exchange Act, which states that "in determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, *the construction most favourable to the validity of the instrument shall be adopted.*"

Furthermore, Section 63 (3) of the *Companies (Consolidation) Act*, 1908, provides that the omission of the name of the company from any negotiable instrument or other document signed or issued on its behalf shall not only render those responsible for the issue or signature *personally* liable on the instrument, but will also render them liable to a fine not exceeding fifty pounds, unless the instrument is duly paid by the company.

### Accounts and Auditors.

Every company is required to keep such accounts as are necessary for the proper and efficient conduct of its business, and if it is a public company it must, as already stated, submit to the Registrar of companies an audited statement in the form of a balance-sheet, duly certified by its auditors appointed in accordance with the provisions of Sections 112-113 of the *Companies (Consolidation) Act*. Every auditor is entitled to have full access to the books and accounts of the company for the purpose of preparing the report which he is required to submit to the shareholders of the company with the balance-sheet placed before them at the Annual General Meeting.

### The Winding-up of a Company.

The existence of the legal person represented by a company is terminated by the process known as "winding-up" or "liquidation", during which its assets are realised and the proceeds applied in payment of its debts, any surplus going to the shareholders of the company in proportion to their paid-up capital.

There are actually four ways in which a company may thus cease to exist: (a) *Compulsory Winding-up* by the Court for various reasons, as, for instance, because the company cannot pay its debts, in which case the winding-up corresponds to the bankruptcy of an individual and is conducted on somewhat similar lines by a liquidator appointed by the Court; (b) *Voluntary Winding-up*, when the company resolves by resolution in general meeting to appoint a liquidator to wind up its affairs, as, for example, when the period fixed by the Articles for the duration of the company has expired; (c) *Winding-up subject to the supervision of the Court*, when, after the commencement of a voluntary winding-up, the Court, upon being petitioned, orders that the winding-up shall thereafter proceed under its supervision; and (d) *Having its name struck off the register of companies* by the Registrar by reason of the illegality of its objects.

In the first case the company is dissolved by order of the Court made after all the affairs of the company have been arranged and the liquidator has made his report, while in the second and third cases the company ceases to exist three months after the date upon which a return of the holding of the final general meeting of the company is made by the liquidator to the Registrar.

### NON-TRADING CORPORATIONS AND COMPANIES

Bankers have sometimes to conduct business with corporations of various kind which have been formed for other than trading purposes. Such corporations may fall into one of four groups: (a) *Common Law Corporations*, including (i) chartered corporations created by charter granted by the Sovereign, for example, the Chartered Institute of Secretaries, and (ii) corporations by prescription, i.e., bodies which have existed for a considerable period of time and have come to be recognised as having corporeal characteristics, as, for instance, the Corporation of the City of London; (b) *Statutory Corporations*, which have been created by special or private Act of Parliament; (c) *Registered Companies*, constituted under the Companies Acts, 1908-17, for other than trade purposes, and generally called "associations not for profit", such as the various companies limited by guarantee formed for educational purposes, including the London Association of Accountants, Ltd., and the Secretaries Association, Ltd.; (d) *Statutory Companies*, formed under special

Acts of Parliament or in accordance with the provisions of special Acts generally applicable to such companies, and having as their object the carrying out of undertakings of a public nature requiring special powers, as, for example, railway companies and local gas, electric light, and water companies.

For our present purposes the last group is the most important. Every company included therein is governed, so far as its constitution and management are concerned, by its creating statute, but is subject also to the *Companies Clauses Acts*, 1845-89, and such of several special Clauses Acts as are appropriate to the particular type of company, as, for example, the *Railways Clauses Act*, 1845, and the *Electric Lighting Clauses Act*, 1899.

All such corporations differ from trading companies in that they are not regarded as having *implied* powers to borrow money, and, accordingly, have only such powers in this respect as are conferred upon them by the special creating statute. It is therefore of first importance that a banker or other person lending money to a non-trading corporation should safeguard himself before any loan is granted by a careful investigation of the statute or statutes under which the corporation is constituted.

Doubt is sometimes expressed as to whether a non-trading corporation has power to issue valid cheques, but Sir John Paget<sup>1</sup> submits the opinion that the power to issue cheques for ordinary payments is inherent in all corporations. At the same time this power should not be assumed to apply to the drawing or acceptance of bills of exchange or to the making of promissory notes.

## ASSOCIATIONS AND SOCIETIES

In addition to companies and corporations the constitution and powers of which are fairly strictly defined by governing statutes, bankers are frequently called upon to open accounts for associations and societies whose powers and constitution are not so well known or so easily ascertainable. Among these are building societies, friendly societies, and associations or committees of various kinds formed for pleasurable, charitable, or sports purposes. It is, of course, essential that transactions of all bodies of this kind should be conducted strictly in accordance with legally recognised practice, and particularly that a lender of money should safeguard himself by reference to the rules or regulations (if any) covering their borrowing powers.

### Building Societies.

A building society is an association of persons formed with the object of subscribing funds or raising capital out of which advances may be made to members of the society for the purchase of

<sup>1</sup> *The Law of Banking*, 3rd edn., page 16.

houses or similar property. As a rule the society takes a mortgage over the property from the borrowing member as security for the advance, and charges the member interest at an agreed rate during the period of the loan.

Formerly building societies were unincorporated, but the majority of societies now existent, and any societies which are now formed, are incorporated under the *Building Societies Acts, 1874-94*. Any three persons may form themselves into such a society by lodging with the Registrar of Friendly Societies two copies of the Rules of the society drawn up in accordance with the provisions of the aforementioned Acts, and signed by the three persons concerned and the secretary of the society. Upon registration a certificate is issued by the Registrar, and thereafter the affairs of the society are managed by a committee of the members, a secretary and auditors, acting under the supervision of the members or shareholders assembled at ordinary and special meetings called in accordance with the Rules.

The borrowing powers of incorporated building societies are controlled by Section 15 of the *Building Societies Act, 1874*, which provides that any societies registered under the Act may receive deposits or loans at interest from members or other persons for the purposes of the society, provided that the amount so borrowed at any time does not, in the case of a *permanent society*, exceed two-thirds of the amount for the time being secured to the society by mortgages from its members, and, in the case of a *terminating society*, a sum not exceeding such two-thirds, or, alternatively, a sum not exceeding twelve months' subscriptions on its shares for the time being in force. A "permanent" society is so described in contradistinction to a "terminating" society, which is formed only for a given time or only for the attainment of a particular purpose.

The Rules of the society strictly define how cheques and other documents are to be signed on its behalf, and it is incumbent upon a banker or other person likely to be affected thereby to see that the Rules are strictly complied with. If the society is duly registered as a friendly society its cheques are exempt from stamp duty.

The existence of a building society is terminated by (a) dissolution in accordance with its Rules; (b) dissolution in accordance with a resolution passed by three-fourths of the members holding at least two-thirds of the shares; (c) decision of the Registrar after investigation of the company's affairs; (d) winding up under the Companies (Consolidation) Act, 1908; and (e) in the case of a terminating society, the lapse of the time for which it was formed or the achievement of the objects for which it was incorporated.

### Friendly Societies.

A friendly society is a society of persons who by voluntary subscription aim at providing for some or all of the following: (a) relief for themselves and their families during sickness, incapacity, old age, or unemployment; (b) insurance of their children and other relatives; (c) endowment of the members or their nominees, and (d) the assistance of the widows and orphans of members.

Friendly societies are controlled by the *Friendly Societies Acts*, 1896-1924, and registration of a society under these Acts may be effected by any seven persons and a secretary, upon lodging with the Registrar of Friendly Societies an application, accompanied by a copy of the society's Rules drawn up in accordance with the Acts, together with a list of trustees or persons who will act on behalf of the society. The society comes into existence upon approval of its Rules by the Registrar, and thereafter its affairs are managed by officers duly appointed in accordance with its Rules.

Under the *Friendly Societies Act*, 1896, a registered friendly society has power to mortgage its property, subject, however, to any provisions contained in its Rules, which will usually strictly define its powers to borrow and to mortgage its property. The Rules also provide how banking accounts in the name of the society are to be opened and conducted, and how cheques and other documents are to be signed on its behalf. Unless these regulations are strictly complied with the society may escape liability. All cheques drawn on behalf of a registered friendly society are exempt from stamp duty.

### Trade Unions.

A Trade Union is a combination of workmen in a trade formed with the object of maintaining and improving their rights and privileges as to wages and hours of labour, and the conditions under which they work. Most trades of any magnitude now have unions of their own, the funds of each union being obtained by contributions and levies from its members, and being applied in furtherance of the object for which it is constituted. A union covering more than one trade is described as a *Trades Union* or *Industrial Union*.

Before 1871 combinations of this kind were illegal, but Section 6 of the *Trade Union Act* of that year permitted any seven or more persons who subscribed to the rules of the union, and otherwise complied with the Act, to form themselves into a trade union, and to register themselves as such under the Act, provided that such registration is void if any purpose of the union is unlawful. In this connection the purposes of a union will not be unlawful merely because they are in restraint of

trade, and therefore illegal at common law. Registration of a trade union must be made with the Registrar of Friendly Societies, who will issue a certificate in evidence of the registration.

Although the existence of a trade union was thus legalised, such a combination is not established as a corporate body, and the 1871 Act specifically debar any Court from entertaining any legal proceeding by a trade union for enforcing any agreements with its members or with other unions. Moreover, the *Trade Union Act*, 1913, while sanctioning the application of trade union funds for certain purposes, forbade their use for political objects unless certain conditions were fulfilled.

All real and personal estate of a registered trade union or of a branch of the union must be vested in trustees for the time being appointed in accordance with the Act of 1871, and such trustees must sue or be sued *in their own names* in any action relative to such estate. By virtue of Section 7 of the Act of 1871, the trustees have power to purchase or lease land not exceeding one acre, and can sell, *mortgage*, let, or exchange that land. With this exception, neither a trade union nor its trustees have any implied power to borrow money or to pledge property of the union, but there is nothing to prevent the Rules of the union conferring such powers, in which case advances may be granted to the trustees in their own names against security lodged by them as trustees on behalf of the union. The trustees are not, however, liable *personally* on any loans thus raised by them.

### Clubs, Committees, and Associations.

Included under this heading are associations of various kinds whose constitution and powers are defined generally according to the wishes of the members, as, for example, literary or political associations, sports clubs, agricultural and flower shows, charitable organisations, and religious institutions.

As a rule, the management and affairs of such bodies are vested in a committee operating through a secretary and treasurer, but as voluntary associations of this kind are unincorporated and are not controlled by any special Acts of Parliament, they cannot sue or be sued as a corporate body in their own names, and the individual members cannot be made liable for any acts of the officers or for any debts incurred by them on behalf of the association or body.

Generally speaking, any persons transacting business with associations of the type here discussed rely primarily upon the personal character of the treasurer and secretary, but for any special purposes, such as that of opening an account with a banker, a duly authenticated resolution of the controlling committee, or of a general meeting of the members, should be obtained.

As a general rule, loans should not be granted to these associations, but if application is made to a banker or other person for

an advance, he should safeguard himself by requiring a person or persons upon whose credit he can rely, to accept definite responsibility for the loan, as, for example, by giving a guarantee assuming liability for the debts of the association.

### Local Authorities.

The *Local Authorities (Financial Provisions) Act*, 1921, defines a Local Authority in England and Wales as (a) the council of any borough, and (b) any authority whose accounts are subject to audit by district auditors appointed by the Ministry of Health, including county councils, urban district councils, rural district councils, port sanitary authorities, parish councils, parish meetings, and boards of guardians. In Ireland a local authority is the council of any county, county borough, or county district, and the board of guardians of any union. This definition is very similar to that contained in the *Local Authorities Act*, 1908.

The constitution and powers of authorities of this kind are strictly controlled by a number of Acts of Parliament, some of which apply generally to all authorities of a particular class, while others are local or specific in their application and deal only with the particular authority to which they relate. The principal General Acts and the authorities to which they apply are as follows :—

LOCAL AUTHORITY.	CONTROLLING STATUTE.
County Councils.	Local Government Act, 1888.
Municipal Corporations, including County Boroughs and Non-County Boroughs.	Municipal Corporations Act, 1882.
Urban District Councils and Rural District Councils.	Public Health Act, 1875.
Boards of Guardians.	Poor Law Acts, 1601-1834.
Parish Meetings and Parish Councils.	Local Government Act, 1894.

In addition, the *Local Authorities (Financial Provisions) Act*, 1921, controls borrowing by the various classes of authority for temporary purposes.

As Sir John Paget points out,<sup>1</sup> the constitution, powers, and limitations of the variety of local government authorities make up one of the most voluminous and complicated special branches of the law, and, in particular, the conditions governing the borrowing powers of such authorities and the disposal of funds by them are replete with difficulties. At the same time, such bodies control large sums of public money and frequently resort to borrowing on an extensive scale, so that from the point of view of a banker they are regarded as important and desirable customers.

The general business of a local authority is transacted at periodical meetings, of which due notice is given to all the members, but, as a rule, special committees of the members are appointed

<sup>1</sup> *Law of Banking*, page 21.



to supervise various branches of the work, as, for example, the Finance Committee and Highways Committee. The principal executive officer is the clerk, a paid servant of the council, but (except in the case of a parish council) all moneys received and paid out by the authority must pass through the hands of an outside treasurer, who must not be a member of the council, and must give adequate security to ensure his faithful performance of his duties. In the case of a parish council the treasurer may be appointed from among the members, provided he gives security in accordance with the regulations. As a rule, the treasurer of a local authority is the manager of a local bank at which the accounts of the authority are kept.

The expenses of local authorities are met out of rates of various kind levied upon the inhabitants of each parish by precept upon its *overseers*, honorary officials whose duty it is to prepare the valuation lists for each parish and to levy and collect the rates, all moneys received by them being paid direct into the account of the treasurer of the authority at a local bank. Payments on behalf of a local authority are made by "orders" which are not strictly cheques, drawn upon the treasurer of the authority. (See Chapter 21.)

In the case of county, borough, urban, and rural district councils, the orders must be signed by three members of the council and countersigned by the clerk or other official approved by the council, but in the case of a parish council, orders must be signed by two members of the council and countersigned by the clerk.

### Borrowing Powers of Local Authorities.

Difficulty frequently arises concerning the borrowing powers of these authorities, for the extent of such powers is not always easily ascertainable, and, even where they exist, they are frequently circumscribed by various Acts of Parliament and by regulations of government departments. Nevertheless, such authorities frequently find it necessary to resort to loans in connection with the various undertakings which they control, for the purpose of supplying local water, gas, electric light, and similar utilities. The loans are obtained in various ways, as by bank overdraft, or by the issue of mortgages, stock, or debentures, but in any case the lender is presumed to know the exact nature and extent of the borrowing powers of the authority, for it has been several times laid down by the Courts that a local authority has no *implied* powers to borrow money, and accordingly if the loan is to be valid, express power must exist in the general Act or special Act under which the authority is constituted.

As a general rule, funds for *permanent* purposes may be borrowed with the consent of the Ministry of Health and subject to certain limits not being exceeded. Thus, a county council may

borrow against the county fund or revenue for such matters as the consolidation of its debt, or the purchase of land or buildings for any permanent work the cost of which is spread over a period of years, but usually the loans are limited to a sum not exceeding one-tenth of the assessable value of the county. Similarly, a board of guardians may borrow money to an extent not greater than one-quarter of the rateable value of the Union, though this limit may be increased to one-half by the Ministry of Health.

The fact that a local authority has statutory power to borrow does not mean that it can obtain loans in any way which it considers desirable or advisable. The borrowing and the security given must be *strictly* in accordance with the controlling Act, and explicitly comply with the sanction of the responsible government department. Furthermore, money borrowed for one purpose must be used for that purpose and for no other, for the accounts relating to various undertakings of a local authority must be kept strictly distinct and watertight. Thus money borrowed by a borough council for purposes connected with the local water supplies cannot be utilised in connection with its electric lighting or tramways department.

Any loans obtained by a local authority in excess of its powers are illegal or *ultra vires*, and the lender cannot demand repayment. In fact, if any invalid loan is obtained, any repayment made or any interest paid by the authority may be disallowed by the government auditor and the lender forced to repay any amounts so paid to the authority. Thus, in the case of *Attorney-General v. Tottenham Urban District Council*, 1910, an amount of £4910 was borrowed from the bankers of the Council without permission of the Local Government Board, and it was decided that not only was repayment of the advance illegal, but also that the defending council must be restrained from applying any part of its funds in payment of interest on the sums borrowed. Again, in *Attorney-General v. Mayor, etc., of the County Borough of West Ham and Others*, 1910, the borough obtained powers to borrow money for a *specific* purpose, but utilised those powers to obtain an advance from their bankers for the *general* purposes of the borough. It was decided that the loan was *ultra vires* and illegal, and that the application of any funds of the borough in repayment of the overdraft was also *ultra vires* and illegal.

### **The Local Authorities (Financial Provisions) Act, 1921.**

The difficulties relating to the borrowing powers of local authorities have been to some extent lessened by the passing of the *Local Authorities (Financial Provisions) Act, 1921*. This Act enables any authority to which it applies (see page 156) to borrow by way of *temporary* loan or overdraft from any bank or otherwise, for the purpose of providing temporarily for any current expenses that may be incurred by the authority in the

execution or performance of its powers or duties. For all such borrowing the consent of the Ministry of Health in England and of the Local Government Board in Ireland must be obtained, but any powers thus sanctioned are in addition to any existing borrowing powers of the authority.

All sums borrowed in accordance with this Act, together with interest thereon, must be repaid out of the revenue of the local authority received in respect of the financial year in which the expenses were incurred, with the exception that in respect of any money borrowed before the 10th April, 1923, the Ministry of Health in England, or the Local Government Board in Ireland, may extend the term of repayment for any period up to ten years from the date of the borrowing. Moreover, any amount thus borrowed is a charge on the whole of the funds, rates, and revenues of the local authority, ranking *pari passu* with all other mortgages affecting such funds, rates, and revenues.

It must be clearly understood that this Act applies only to borrowings for *temporary* purposes, so that any loans obtained in accordance with its provisions cannot be applied for permanent purposes, otherwise the loan will be invalid and its amount irrecoverable by the lender.

PART III  
BANKER AND CUSTOMER

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CHAPTER 10

THE CUSTOMER'S ACCOUNT

It has been stated in an earlier chapter that one of the most pleasing duties that falls to be done during the day's work at a bank branch is—or at least should be—the opening of accounts for new customers, but it will be clear from what has been said in the three preceding chapters that, even in the simplest cases, there are a number of formalities which must be strictly adhered to if the customer is to be properly protected and the interests of the bank adequately safeguarded.

It is reiterated that the opening of an account involves the making of a clearly defined contract between the bank and the new customer, in which the parties assume certain obligations and become entitled to certain legally enforceable rights. In view of this, it is usual for the bank to safeguard itself in the first instance by requiring some form of introduction from all persons who are not already known personally or by repute to the manager or any members of the staff. Such introduction may consist of a reference to some other person or body known to the bank, or to some other bank, in which case a confidential inquiry is made regarding the standing of the person concerned. It is of particular importance that a cheque-book should not be issued until satisfactory information has been received, otherwise innocent third parties may suffer through accepting cheques against which no funds are held at the bank.

Clearly, a considerable degree of tact is necessary in dealing with such matters, but, as previously pointed out, a bank is not *bound* to open an account for anyone who likes to enter its doors, for no person can be compelled to enter into a binding contract unless he wishes to do so. Furthermore, it is always best for new customers to attend personally at the branch, wherever possible, so that they may be interviewed by the manager, or in his absence by the accountant, for among the most important duties of the senior branch official is that of welcoming new customers and of explaining to them the methods and terms of the bank's business, in addition to which he will almost in-

variably make the necessary arrangements respecting all new loans and advances on current account.

### The Signature Index.

When a decision has been reached as to the nature of the account, the next step is to obtain the signature or signatures of the person or persons who are to operate the account in a special *Signature Book* which is kept for the purpose, or upon a specially ruled card, if a card-index system is maintained. As a rule, separate books or separate card indexes are kept for current and deposit account signatures, but in all cases particulars of the customer's full name, occupation, and address are appended. For convenience of reference all signatures in the *Signature Book* are indexed alphabetically at the beginning of the book, but if cards are used, they are, of course, filed away in alphabetical order.

Sometimes the person opening the account is merely an agent acting for the purpose on behalf of the actual customer, or he may be acting on behalf of himself and another person or persons. Thus a husband may open an account on behalf of himself and his wife, or a partner on behalf of himself and the other members of his firm, or the secretary of a limited company on behalf of the company and its directors. In all such cases the signatures of all those who will sign cheques must be obtained, and a request will accordingly be made that the persons concerned attend at the bank for the purpose, or that they forward specimens of their signatures as soon as possible.

### Mandates relating to Accounts.

The signatures of all persons entitled to sign cheques on a joint account (i.e., the account of two or more parties), or upon the account of a partnership, company, or corporation, will be obtained by the bank upon a form of authority described as a *mandate*, embodying definite instructions as to how and by whom cheques on the accounts are to be signed, and, in the case of joint accounts, as to how the balance of the account is to be dealt with in the case of the death of one or some of the parties. Thus the mandate of a joint account may provide that cheques shall be drawn by any one of the parties; that of a partnership may decree that the signature on cheques of one or some of the partners will be sufficient; while that of a joint-stock company may instruct the bank to pay cheques signed by any two of its directors and countersigned by the secretary for the time being. Specimens of the forms used for this purpose are given in Chapters 20 and 21.

Frequently the customer wishes the bank to honour cheques

must include two parallel transverse lines written, perforated across the face of the cheque, and these lines may be accompanied by any such additions as the words "& Co.", "Not negotiable", "Account Payee", "Account Thomas Robinson", "of & Co.", " . . . pounds". In all these cases it is the lines which constitute the crossing, and although the additional words or "Under" have a certain definite effect—discussed below—they are not an essential part of the crossing, nor do they constitute a crossing if the transverse lines are absent.

The name of a banker written, stamped, or perforated across the face of a cheque forms a *special* crossing, whether it appears alone or with transverse lines, or with any of the additional words which have been mentioned. In this connection it is interesting to note that the words "and company", which so frequently form part of a general crossing, are a relic of the days when most bankers were private concerns operating under some such name as "Brown, Robinson and Company", the last two words being inserted by the drawer with the intention that the remainder of the name of the banking firm would be filled in by the payee, with the object, as we shall see later, of protecting the drawer and the holder by making it impossible for a thief to encash such a cheque over the counter.

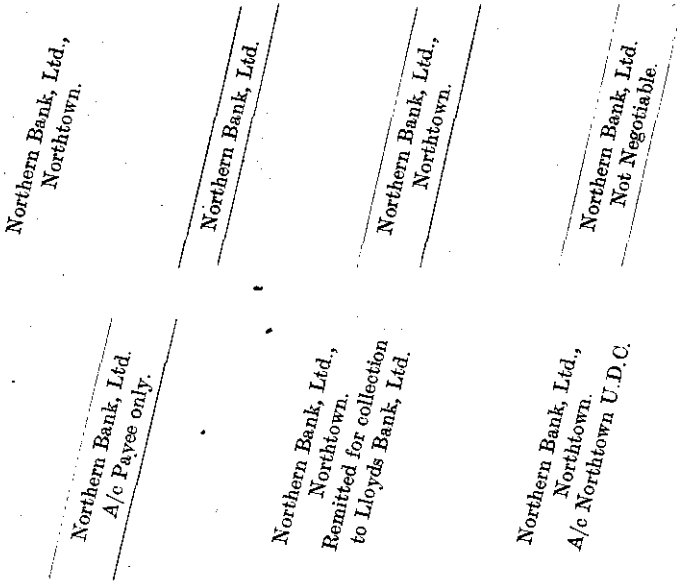
The following are specimens of the most frequently used forms of general and special crossings.

SPECIMENS OF GENERAL CROSSINGS



to all intents and purposes, therefore,

SPECIMENS OF SPECIAL CROSSINGS



The Words "Not Negotiable".

Of the additional words which are frequently added to a crossing only the words "Not negotiable" are recognised by the Bills of Exchange Act as having any special effect, and in regard to these, Section 81 provides:—

81. Where a person takes a crossed cheque which bears on it the words "not negotiable", he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

In order to be operative the words must clearly form part of the crossing, and must therefore appear in close proximity to the two parallel lines or the name of a banker.

It must be distinctly understood that the effect of this section is in no way to restrict the *transfer* of a cheque from one person to another, but it has the effect of removing from a cheque that characteristic of negotiability to which we have previously referred (see *ante*, page 195), and by virtue of which any holder who takes the instrument in good faith and for value is enabled to sue in his own name free from any defects in the title of the person from whom he received the instrument. If therefore a person takes from a thief or finder a cheque crossed "Not negotiable" which has been stolen or lost, he cannot enforce payment of the instrument nor can he retain any moneys paid to him in

customers' accounts. As a rule, the bank will have been authorised by the customer to receive such payments on his behalf and to place them to the credit of a specific account, but in any case a prompt advice of the credit, specifying the nature and amount of the items, should be sent to the customer, and a proper acknowledgment made to the third party. If the credit is received from the third party by post, the banker's letter of acknowledgment to that party requires a receipt stamp if the amount is £2 or over, but a similar acknowledgment sent to a customer in respect of a remittance by him to his credit does not require a receipt stamp, for the *Stamp Act*, 1891, specifically exempts from this duty "any receipt given for money deposited in any bank, or with any bank, to be accounted for and *expressed to be received of the person to whom the sum is to be accounted for*". A similar exemption applies to "an acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment", and also to any letter advising a customer of a payment to his credit by a third party.

Finally, it should be noted that bills of exchange, coupons, and drawn bonds are frequently placed by a customer in his banker's hands for collection and credit to his account. In such cases no entry is made in the customer's account until the proceeds are received by the banker, but when this happens a proper advice should of course be sent to the customer, clearly specifying how the amount is made up, the price or rate of exchange (if any) at which the items were sold or negotiated, and any expenses which may have been incurred or charges made by the banker in respect of the service.

### The Relation of a Banker to his Customer.

It is usually stated that the relation of banker and customer is that of debtor and creditor, subject to the obligation of the banker to honour the customer's cheques up to the amount of any available credit balance of the customer, or up to the limit of any overdraft which the banker has agreed to allow. As a general statement this is true, for a banker does not become a *trustee* of the money left with him by the customer, nor does he become an *agent* of the customer, responsible to him for the disposal of the money, although, as we shall see later, a banker often undertakes duties which make him both agent and trustee of his customers.

Money left with a banker on deposit or current account is *at his absolute disposal* to do with as he pleases, for it is really *lent* to him by the customer, subject to the banker's undertaking to repay the amount in accordance with arrangements made when the account is opened. In the case of a current account, the agreement is that the banker will pay the amount on demand



either in whole or in part, while in the case of a deposit account subject to notice, the banker undertakes to repay the money at the expiration of an agreed period of notice.

The debt which is created by the deposit of funds with a banker also resembles any other debt in the fact that, if the banker becomes bankrupt, the customer has no rights other than those of an ordinary creditor; he must prove in the bankruptcy for the amount standing to his credit and accept a dividend (if any) out of the realised proceeds of the banker's assets.

It has, however, been recently decided by the Courts that the debt due by a banker to his customer differs from ordinary commercial debts in one important respect not previously recognised. In the case of ordinary debts a request by the creditor for payment is unnecessary unless the parties have stipulated that it shall be made, for the law requires a debtor to seek out his creditor and to pay him whatever is due. In other words, a demand for repayment is not in ordinary cases a condition precedent to the existence of a present enforceable debt.

In the case of *Joachimson v. Swiss Bank Corporation*, 1921, it was clearly and unmistakably laid down by the Court of Appeal that this rule of law does *not* apply to a banker's debt to his customer, but that an express demand for repayment by the customer is necessary before the debt becomes what is known as "actually and accruing due". This principle was recognised by the Court as being essential if the business of banking is to be conducted upon sound and reasonable lines, for, in the absence of such a distinction between a banker's debt and an ordinary commercial debt, the banker owing money to a customer would have the right to tender the full amount of the customer's credit balance in repayment of the debt at any time and at any place, thus summarily closing the account without notice and possibly injuring the customer's credit through the subsequent dishonour of his cheques. "In the absence of special stipulation a banker can close his customer's banking account in credit only on giving him reasonable notice, dependent on the nature of the account and the facts and circumstances of the case" (*Prosperity, Ltd. v. Lloyds Bank, Ltd.*, 1923).

On the other hand, if such a principle as that referred to did not exist, the customer could demand repayment of his balance at any branch of the bank, and at any time, conditions that would be clearly subversive to the established principles of banking in this country, which require a customer to draw cheques only upon the branch where he keeps his account, and also to demand payment only during recognised business hours.

The considered opinion of the Court in the *Joachimson Case* regarding the relation of banker and customer was well expressed by Lord Justice Atkins in the following terms: "The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust

for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept and during banking hours. It includes a promise to repay any part of the amount due, against the written order of the customer addressed to the bank at the branch; and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept. Whether he must demand it in writing it is not necessary now to determine".

It should be understood that the foregoing applies equally to a current account, deposit account, or to a deposit receipt, except that in the two last cases it has always been a well-recognised principle that the giving of notice, where notice is stipulated for, and the production of the deposit receipt, where such is issued, are conditions precedent to the right of the customer to demand repayment of the balance due to him.

### Current Accounts and the Statute of Limitation.

The decision in the case of *Joachimson v. Swiss Bank Corporation* is of technical though not of great practical importance in its bearing upon the effect of what is known as the *Statute of Limitation* on the debt owing by a banker to his customer. The object of this statute (properly designated the *Limitation Act, 1623*) is to protect a debtor from being sued by a creditor for the recovery of debts which have been outstanding for a considerable time, and its effect is that an action to enforce a simple contract debt must be commenced before the expiration of *six years* from the time when right of action first arose. Right of action arises on ordinary debts from the date when the debt is payable, or (under the Statute of Frauds Amendment Act, 1828) from the date of the last acknowledgment of the existence of the debt made in writing by the debtor or his duly authorised agent, or of the last part payment of the principal or payment of interest on the amount owing.

Accordingly, it was generally considered prior to the decision in the case mentioned that action for the recovery of the debt owing by a banker to his customer was barred after the lapse of six years from the time the money was deposited, in the same way as any other debt, unless there had been in the meantime some acknowledgment of the existence of the debt or a partial repayment thereof to the customer. In other words, it was

thought that a customer could not sue a banker for the return of his credit balance if there had been no dealings or communication between them regarding the account for a period of six years.

The judgment referred to, however, clearly demonstrated that this principle is wrong, for a debt owing by a banker does not become *due and payable* until the customer has made a specific demand for repayment, so that the six years required by the statute would not commence to run until such a demand had been made.

In practice, of course, no bank in this country would refuse payment of a balance once a demand therefor was made by the person entitled to the money, but the point is of interest in so far as it affects the considerable amounts of money referred to as "Unclaimed Balances" which have remained in the hands of bankers for years without any request for repayment having been made. Formerly it was considered that such balances had legally become the absolute property of the banks concerned by virtue of the operation of the Limitation Act, but from what has been stated it is clear that this is not the case, and the rightful owners (if they exist) may demand and enforce repayment at any time.

It is to be noted, however, that this principle does not apply in the reverse case when the customer is the debtor by reason of having obtained a loan or overdraft from the banker. In such circumstances the relationship is essentially that of debtor and creditor, and, in the absence of any express agreement as to demand for, or the date of, repayment, the debt is one which is immediately accruing due and liable to be called for at any time after the date of the advance. Accordingly, the Statute of Limitation begins to run from the date of each advance (*Parrs Bank v. Yates*, 1898), and the customer cannot be sued for repayment of the debt if for six years after the date of any advance he has not made any acknowledgment of the obligation or repaid any part of what is due, or paid any interest thereon, and the banker has failed to commence proceedings for recovery. The mere charging of interest on the account by the banker will not operate to prevent the debt becoming irrecoverable or "statute-barred", as it is technically termed.

But although the Statute may thus prevent a banker or any other creditor from suing in a Court of Law for the recovery of a debt which has been owing to him and unacknowledged for more than six years, it does not prevent him from obtaining payment by retaining and realising on any securities of the debtor which have come into his hands in the ordinary course of business. Nor would it prevent a creditor from suing a person who has given a continuing guarantee for the due payment of the debt, if the guarantee contains an undertaking by the surety to repay the advance "on demand", or "three days after demand", for in such cases the Statute does not begin to run

until an express demand for repayment has been made by the creditor and has been refused by the surety.

### **Deposit Accounts and the Statute of Limitation.**

It may be stated generally that the Statute of Limitation does not affect sums left on deposit account subject to notice or on deposit receipt, for, as has already been pointed out, the debt in such cases does not become repayable by the banker, and, therefore, the statute does not begin to run, until the expiration of the stipulated notice of withdrawal given by the customer, or, in the case of a deposit receipt, until return of the properly discharged receipt to the banker. Moreover, in the case of a deposit account the action of the Statute is effectively prevented by the practice of banks of periodically adding interest to such accounts, for these periodical payments of interest clearly amount to acknowledgments by the debtor sufficient to prevent the operation of the Statute.

### **Special Features of the Relation between a Banker and his Customer.**

As is indicated by the judgment of L.J. Atkins in the Joachimson Case, there are a number of special features in the relationship between a banker and his customer which considerably modify the ordinary relationship of the parties as debtor and creditor, or borrower and lender, and it is now necessary to consider these special features in some detail.

In the first place we will repeat that money left by the customer with his banker is at the latter's absolute disposal. There is no question of the banker's receiving the funds as an agent or as a trustee, and, subject to what is stated hereafter as to the customer's right of appropriating the credit to any particular account, the banker may deal with the money as he pleases, the customer, like any other lender, losing the right to control the funds and retaining only the right of re-payment. Furthermore, so long as the banker acts in good faith and without notice of any irregularity or illegality, he is not concerned as to how the customer obtained the money which he pays in, nor is it any business of his as to what the money is to be used for. His business is to provide a convenient place where the customer may lodge his funds until he requires them, to repay the funds when they are demanded in accordance with the agreement made, and in the meantime to make what profit he can out of the money so placed at his disposal.

### **The Appropriation of Payments.**

The banker's right to deal with the customer's money as he pleases is subject to the important reservation that the customer,

when he pays in money, or when money is received from third parties for his credit, has the right to *appropriate* the money if he chooses to do so. This means that if he has several accounts he can stipulate that the funds are to be placed in whichever account or accounts he may select, or to be applied in payment of a particular debt, or he may insist that some or all of the money is to be held and applied specifically to meet certain cheques, or to pay certain bills upon which he is liable as a party.

Such an appropriation must be made at the time when the money is paid in to the customer's account, but when once the bank has been informed of the appropriation, the decision cannot be withdrawn or varied by the customer. On the other hand, the banker is bound to act upon the customer's instructions, and this is so whatever the state of accounts between them. Thus a customer may have a large overdraft which the banker is very anxious to reduce, but for all that he cannot apply a credit paid in by the customer in reduction of the overdraft if the customer directs that the credit is to meet certain cheques which he has drawn.

In the absence of any appropriation by the customer, the banker has the right to apply funds paid in to lessen or wipe off any debt owing to him by the customer, including even a debt which is barred by the Statute of Limitation by reason of the customer's omission to acknowledge its existence, or to repay any portion of what is due. But, when once such an appropriation is made and communicated to the customer it cannot be varied or revoked by the banker, and it is binding both upon him and upon his customer.

### The Rule in Clayton's Case, 1816.

In practice, specific appropriations of the kind here referred to are rarely made as between banker and customer, but it sometimes becomes necessary to determine in the absence of such appropriation how money paid into a current account shall be deemed to have been applied. The general rule of law in this respect was thus stated by Lord Shaw in *Deeley v. Lloyds Bank*, 1912 :—

“According to the law of England, the person paying the money has the primary right to say to what account it shall be appropriated; the creditor, if the debtor makes no appropriation, has the right to appropriate; and if neither exercises the right of appropriation, one can look on the matter as a matter of account and see how the creditor has dealt with the payment in order to ascertain how in fact he did appropriate it. And if there is nothing more than a current account kept by the creditor, or a particular account kept by the creditor and he carries the money to that particular account, then the Court concludes that

the appropriation has been made; and, having been made, it is made once for all, and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation."

The matter is therefore one of account between the parties, and where a current account exists, the appropriation of successive payments in are deemed by the law to have been made in accordance with what is known as the *Rule in Clayton's Case*, 1816, which provides that where there is a current account between the parties, and no evidence of the appropriation of the items therein, *the money first paid in shall be deemed to have been first drawn out*, i.e., the credits in order of entry in the account shall be deemed to have discharged the debits in the order in which they appear. In the following example the letters in italics opposite the various items will indicate how they would be presumed to have been discharged in accordance with this Rule. The first debit (i.e. opening balance) is discharged by credits *A* and *B*, and so on:—

## JOHN BROWN'S ACCOUNT

		£	s.	d.	£	s.	d.	
19..								
Jan. 1.	Balance <i>b/d.</i> . . . . . <i>Dr. (A &amp; B)</i>	150	0	0				
	By cheques . . . . .				85	0	0	<i>A</i>
" 2.	A. Robinson . . . . . <i>(C &amp; Part D)</i>	23	10	0				
	T. Jones . . . . . <i>(Part D)</i>	7	10	0				
	By cash . . . . .				65	0	0	<i>B.</i>
" 3.	G. MacDonald . . . . . <i>(Part D)</i>	5	0	0				
	A. R. James . . . . . <i>(Part E)</i>	8	0	0				
	By Bill collected . . . . .				18	10	0	<i>C</i>
	By cheques . . . . .				17	10	0	<i>D</i>
	By cash . . . . .				12	0	0	<i>E</i>

Consequently, if a banker or his customer wishes to make an appropriation otherwise than in accordance with this general Rule, he should indicate his intention clearly and unmistakably to the other party. This principle is of particular importance in its bearing upon an overdrawn account and the rights of a banker under a guarantee, or against a deceased's estate, or against a partnership the constitution of which has been changed. These points are discussed elsewhere, but here it may be noted that if a banker wishes to prevent the operation of the Rule, which, it should be noted, applies only in the case of a *current* or *running* account, he should *break* the account, i.e., discontinue all entries thereon, and open a new account, if possible getting the consent of the customer or of his legal representatives to the action which he has taken for his own protection.

### The Banker's Obligation to pay his Customer's Cheques.

The feature which most distinguishes the relationship of banker and customer from that existing between other borrowers

and lenders is the recognised obligation of the banker to honour his customer's cheques to the extent of the customer's balance, or up to the amount of an agreed limit if an overdraft has been granted, provided such cheques are in proper form, and that no legal bar exists to prevent the banker from paying them.

The requisites as to form so far as a cheque is concerned are dealt with in Chapter 12, while the conditions which determine a banker's authority to pay are discussed in Chapter 14. Here, however, we may note that this duty of a banker arises out of two implied agreements between the parties. The first is that the banker will repay what he borrows from his customer provided the latter makes a properly written demand for repayment at the correct branch. (See L.J. Atkins' judgment, page 165, *ante*.) The other agreement is that the banker will not injure his customer's credit by refusing to pay cheques except upon reasonable and proper grounds, for "if a banker wrongly refuses to honour his customer's cheque, the customer is entitled to substantial but temperate damages, such as will be a reasonable compensation for the injury which he must have sustained from the dishonour of his cheque".<sup>1</sup>

Moreover, the obligation of a banker is to pay only on the written order of the customer or of his duly *authorised* agent and of no one else, and accordingly if he pays away funds of his customer against a signature which is either forged or unauthorised he will be liable to refund the money. In paying cheques of a customer a banker is legally regarded as a *mandatory*, i.e., one acting upon express or implied instructions of a *mandant*—in this case the customer. As a mandatory, the banker is liable if he acts otherwise than in accordance with his instructions, in addition to which he is expected to know his customer's signature, and to act only in accordance therewith.

The banker is, of course, acting upon the written instructions of his customer if he pays cheques signed by an agent of the customer who has been properly authorised by the latter in writing, for the general rule of agency applies, *qui facit per alium facit per se*, i.e., he who acts (including "writes") through an agent is deemed to so act himself.

This duty of the banker to act only on his customer's proper instructions implies a duty on the part of the customer that he will not draw cheques in such a manner that the banker will be led into error. Thus in the case *London Joint-Stock Bank v. MacMillan*, 1918, Lord Haldane observed: "The customer contracts reciprocally that in drawing his cheques he will draw them in such a form as will enable the banker to fulfil his obligations, and therefore in a form which is clear and free from ambiguity. The banker, as a mandatory, has a right to insist on having his mandate in a form which does not leave room for misgiving as to what he is called upon to do".

<sup>1</sup> *Fleming v. Bank of New Zealand*, 1900.

Failure on the part of the customer to carry out his duty in this respect may absolve the banker from his obligation to pay, and he is quite in order in returning an irregular or ambiguous cheque with such an answer as "Cheque irregular, requires drawer's confirmation". The banker should, of course, endeavour at all times to safeguard the customer's credit, but it is not part of his duty to incur risks or accept liabilities which were not contemplated as likely to arise in the ordinary course of business between him and the customer.

It must be carefully noted also that the banker's duty to pay cheques drawn by his customer does not apply to orders for payment issued by the customer against any balance which he may have on *deposit* account, and although in practice bankers frequently do pay such orders for the convenience of their customers, they would be quite justified in refusing to do so. Deposit accounts are accepted on the distinct understanding that the banker is entitled to an agreed period of notice, and apart from this, the drawing and paying of cheques drawn on deposit account is not regarded as being in the ordinary course of business between a banker and his customer.

Again, the duty of a banker to pay his customer's cheques does not apply to bills of exchange accepted by the customer payable at the bank, even though the customer's credit balance is sufficient to justify such payments. There may, however, be a definite agreement between the parties that any bills so presented shall be paid by the bank, but even if no arrangement is made, the customer's signature on a bill which is made payable at the bank is in itself sufficient authority to the banker to pay the instrument and debit the relative account, even to the extent of granting an overdraft if he so wishes.

It is to be emphasised, also, that the banker's duty is to pay cheques only at the branch at which the customer keeps his account, and, in the absence of special arrangements, one branch of the bank is quite justified in refusing to pay cheques drawn by a customer of another branch of the same bank. Arrangements are, however, frequently made at a customer's request to enable him to cash his cheques at another branch or at other branches of the same bank, or at a branch or branches of another bank. An arrangement of this kind is referred to as the "*Payment of Cheques under Advice*", for the cashing branch or bank is instructed by special letter of advice (confirmed in the case of two distinct banks by their respective head offices) to cash cheques of the customer up to a stated amount during any one day, week, month or other period. The letter is accompanied by a specimen signature of the customer, and provides that the arrangement shall continue either for a stated period or until it is countermanded by the issuing banker.

Particulars of all such arrangements affecting accounts at a branch are carefully recorded in a "*Credits Opened Book*", and



a note thereof is also placed at the head of the ledger account of the customer concerned. As a rule, the same book records particulars of all credits opened at the branch on behalf of customers of other branches or of other banks, and it is of course imperative that instructions so given should not be exceeded in any way, otherwise the cashing bank may render itself liable to loss. It is also of first importance, where the cashing banker and drawee banker are different, that the cashing banker should ensure that money paid against such cheques is handed to the right person, for if the signature proves to be a forgery, the cashing banker will have to stand the loss unless he has been indemnified by the banker opening the credit. (See Chapter 15.) As an additional safeguard, all cheques thus cashed are presented direct to the drawee banker by the cashing bank and are not passed through the clearing, the cheques being crossed with the stamp of the cashing banker and marked "Paid by Order" or simply "B/O" in the top left hand corner.

### **The Banker's Right to Charge Interest and Commission.**

A banker cannot, of course, be expected to work for nothing, and the law recognises that, in addition to charging interest at an agreed rate upon any sums he may advance to a customer, the banker is entitled also to demand reasonable payment for the wide facilities which he places at the disposal of his customers. Unless, therefore, the average balance maintained on an account is considered sufficient to reimburse the banker for his trouble, it is usual for bankers in this country to charge "commission" at an agreed or customary rate per cent. (e.g., 2s. 6d. or one-eighth per £100) on the half-yearly or quarterly turnover on a current account, the commission being calculated and debited to the customer at each balance period, when the amounts of interest due to or payable by customers are also calculated and credited or charged. By "*turnover*" is meant the total of the debit items on a customer's account during the accounting period, less the debit balance brought forward, if any. Frequently and particularly in the case of small accounts, the customer is charged a fixed sum as commission for the keeping of his account instead of a percentage on his total turnover.

Charges of this kind must be imposed strictly in accordance with arrangements (if any) made with the customer when the account is opened, but if no arrangement is made, the banker is entitled to charge what is usual and reasonable. But a banker is not entitled in the absence of an express agreement or without due notice, to debit such charges to the account of a customer at any other than the customary times. For if by reason of his having done so the customer's balance is so affected that the banker is compelled to dishonour cheques subsequently presented, the customer may hold the banker liable for injury to his credit.

It will be clear that the periodical addition of interest to a current account results in the customer being charged *compound interest* on the balance outstanding, at quarterly or half-yearly intervals as the case may be. But this implied right to charge compound interest ceases as from the date of death of a customer or as from the date of his committing an act of bankruptcy upon which he is subsequently adjudged bankrupt. The banker may, however, charge *simple interest* in the first case from the date of death until he receives payment of his debt, and in the second case, simple interest at a rate not exceeding four per cent. per annum from the date of his customer's act of bankruptcy up to the date of the making of a receiving order against him.

### The Banker's Duty of Secrecy.

In ordinary business transactions it is always advisable, although by no means imperative, that the parties should regard as confidential the relations which exist between them, but it is part of the recognised relationship between a banker and his customer that the former will not disclose the state of his customer's account "except upon reasonable and proper occasion" (see below). This implied duty of secrecy arises from the fact that considerable harm may be done to a person's credit and business by the disclosure of matters relative to his financial position, and a customer who can show that his credit or reputation has suffered in consequence of an unjustifiable disclosure of his affairs may be awarded special damages by the Court.

Bankers have been long accustomed, however, to give "confidential *opinions*" to one another, and to the so-called "trade protection agencies", concerning the credit and standing of customers, the practice being so well established that probably no customer could successfully object to it, unless he had expressly instructed his banker not to give such opinions. This implied consent of a customer to the giving of opinions by a banker was recognised in the case of *Tournier v. National Provincial Bank*, 1924, in which it was clearly laid down that there are four reasonable and proper occasions upon which disclosure by a banker is permissible, viz. :—

- (1) Where there is compulsion of law, as, for example, where under the *Bankers' Books Evidence Act*, 1879, a banker is ordered by the Court or a judge to produce his books in court, or to produce a certified and duly sworn copy of an entry or entries therein.
- (2) Where there is a duty to the public to disclose, as, for example, where disclosure is necessary in order to avert a danger to the State.
- (3) Where the interests of the bank require disclosure, as in

the case where a banker issues a writ claiming payment of an overdraft and the amount thereof must be stated on the writ.

- (4) Where there is an express or implied consent of the customer, as where a customer gives his banker as a reference. As stated, the customer's consent will be implied where a reference is given by one banker to another in accordance with their customary practice.

When a confidential opinion is given, the information therein should be of an essentially general nature, embodying the banker's considered and truthful opinion as to the general reputation and financial position of his customer, but omitting any details which might infringe the customer's right to secrecy concerning his account. "It is not the duty of a banker to make enquiries other than what appears from the books of account before him, or, of course, to give information other than what he is acquainted with from his personal knowledge. A banker can be made liable only if he answers an enquiry knowing what he says to be untrue, or recklessly, without caring whether it be true or false" (Hart).

The liability referred to in this quotation includes the liability of a banker to his customer for giving wrong information, and also his liability to third parties who to their detriment may be led to rely upon too sanguine representations made by a banker concerning the customer's position. Formerly it was thought that a banker could avoid any liability in this connection by omitting to sign the letter or memorandum in which the confidential information is given, reliance being placed on Section 6 of the *Statute of Frauds Amendment Act, 1828* (Lord Tenterden's Act), to the effect that:—

No action shall be brought whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon it, *unless such representation or assurance be made in writing, signed by the party to be charged therewith.*

The view prevailed that, by virtue of the proviso in italics, a bank could not be made liable if the opinion was not signed, and that even if the letter was signed by the manager, he alone and not the bank itself could be held liable. In the case of *Banbury v. The Bank of Montreal, 1918*, however, the House of Lords clearly showed that Lord Tenterden's Act applies only to *false and fraudulent* misrepresentation, and that it does not touch *innocent* misrepresentation.

From the point of view of bankers, protection in the case of *fraudulent* misrepresentation is not of great practical importance, for it is not likely that a manager would give information with the intention to defraud. On the other hand, there is ground

for an action against a bank or any other person in respect of a misrepresentation made innocently, if it can be shown that in making the representation the banker or other person had a *duty* to perform and that he was negligent in discharging that duty. It is to be assumed that in answering enquiries concerning his customers the banker *has* a duty to perform, and accordingly if he does not take due care over the discharge of that duty he will render himself liable, at the suit of the party who suffers damage, to an action for negligence and breach of duty.

In such circumstances it is the bank itself (as principal) and not the manager (as agent) which is liable, for the latter cannot be held personally responsible for mistakes which arise in the ordinary course of his business as an agent for the bank. It is clear, therefore, that a bank manager should take extreme care in giving opinions concerning the reputation and standing of his customers, and it is a sound rule in such cases to answer as generally as possible and to say as little as possible.

### The Banker's Right of Set-Off.

As a general rule, a debtor is entitled at law to "*set-off*" against the debt which he owes any amount which is due to him by the creditor, i.e., he may combine the credit and the debit in order to determine his *net* liability, provided that the debts are both sums certain, due as between the same parties in the same right, and provided also that there is no express or implied agreement or understanding to the contrary.

In accordance with this general rule, bankers have assumed that if a customer had two or more accounts in the same right, one or some in credit and the other or others in debit, they were entitled to set off any credit balance against any debit balance, and to combine the accounts *at any time* in order to determine the net liability of the customer to the bank. Thus it has been quite usual for bankers, without making any special arrangement, to permit a customer to overdraw his current account without security provided he maintains a more than equivalent balance on deposit account or on deposit receipt. This practice is extended even to accounts of the same customer at different branches, a credit account at one branch being regarded as a set-off to an overdraft of the same customer at another branch.

In the case of *Greenhalgh v. Union Bank of Manchester, Ltd.*, 1924, however, Mr Justice Swift decided that, where a customer has two separate accounts in one name, "the very basis of his agreement is that the accounts shall be kept separate", and that the banker "has no right, *without the assent of the customer*, to move either assets or liabilities from one account to another". It follows from this decision that unless there is an express agreement when the accounts are opened, or unless the customer's consent is subsequently obtained, a banker *has no right to set off*

*two accounts of the same customer*, and it would, therefore, be very unsafe to permit a customer to overdraw on one account in reliance upon a credit balance maintained on another.

Accordingly, in any case where he is thus relying or proposes to rely upon a credit balance or deposit account as a set-off against an advance, a banker should take a written agreement from the customer giving him authority at any time to combine the accounts without notice in order to determine the customer's net liability to the bank, and if necessary to return cheques which, if paid, would result in the customer's obtaining accommodation which the banker was not prepared to grant. Even if such an agreement exists, it is advisable to give the customer reasonable notice before the right of set-off is actually exercised.

It is to be noted that, as a general rule, accounts which are set-off must be *in the same right*. Thus a current account and a deposit account in the same name or names may be combined, with the customer's consent, as also may two accounts of the same customer headed respectively "No. 1 Account" and "No. 2 Account", provided that the banker has no actual or constructive notice that one of the accounts is connected with a trust or agency exercised by the customer. An account, the heading of which indicates that it is a trust or agency account, cannot in any circumstances be set off against any other account of the same customer (unless there should be two of such accounts in the same right), otherwise the banker would render himself liable as a party to a breach of trust. Thus headings such as "Golf Club Account", "Mothers' Union Account" and "Benevolent Fund Account" are clearly indicative of the fiduciary character of the funds passing through them, and the balances thereof cannot be combined with the private accounts of the customers operating thereon *even if the sanction of the customers is obtained*. Bankers should, therefore, exercise scrupulous care in agreeing to set off different accounts in the name of public officers, or similar persons who are known to have the control of funds in a fiduciary capacity.

For similar reasons a banker cannot set off a partner's credit balance against a debt due by his firm, or *vice versa*. Neither can he combine the private account of a customer with an account upon which the customer appears as one of the parties, nor set off a debit or credit balance on the account of a deceased customer with a credit or debit balance standing in the names of his executors or administrators. The practice in the latter case is to obtain a cheque signed by the personal representatives making any necessary transfer.

It has also been clearly decided in the Courts that, when a *current* account has been credited with an amount advanced by the banker on a separate *loan* account to the same customer, the banker cannot treat the two accounts as one, nor is he entitled to combine two such accounts, without giving reasonable and

proper notice to his customer, and honouring all cheques which may have been issued by the customer prior to receipt of the notice. On the other hand, if the customer does anything which has the effect of depreciating the value of security held by the bank in respect of a loan—as, for example, by giving a legal charge over property in respect of which the banker has an *equitable* charge,—then the banker is entitled to regard his contract with the customer as broken and to combine the two accounts without notice, if necessary dishonouring any cheques subsequently presented. Finally, it must be remembered that a banker has in no circumstances a right to set off the balance of different accounts of a public authority. (See Chapters 9 and 21.)

These general rules regarding a banker's absence of authority to combine two accounts of the same customer apply only so long as the accounts are operative and current, but as soon as a customer's account is *stopped*, as for example by his death, bankruptcy, or insanity, or by the service of a garnishee order (see *post*, page 182), then the banker may combine the accounts in order to determine the net liability of the customer's estate to the bank. Furthermore, a banker is compelled to combine different accounts if he holds securities of his customer to cover the *ultimate* balance which may be due by that customer to the bank.

It sometimes happens that a third party agrees that the credit balance for the time being on his account shall be held by the banker as a set-off against debts or liabilities due to the banker by another customer, the agreement being evidenced by a memorandum in writing signed by the third party over a 6d. stamp. As a rule, the document provides that the banker may at any time, without notice, transfer such portion of the credit balance on the signer's account as may be necessary to discharge the liability of the person benefiting from the arrangement, and also that, during the term of the agreement or until it is terminated by specified notice, the signer will maintain a credit balance on his account sufficient to meet the liability of the debtor to the bank.

### The Banker's Right of Lien.

A further special feature of the relationship between a banker and his customer is his right of *general lien* over such of his customer's securities as come into his hands in the ordinary course of his business as a banker. Consideration of this important matter is deferred to Chapter 22, which deals with a customer's securities against advances.

### “The Usual Course of Business”.

It is of importance that in all his dealings with a customer the banker should act in accordance with what is described as “the

usual course of business", for if he fails to do so he may render himself liable for any loss or damage which arises and to an action by his customer for negligence. As to what is the usual course of business will depend generally on the custom of bankers in this country; "it must be the recognised or customary course of business of the banking community at large, not of any particular bank or group of banks, and a court might well reject anything which savoured of rashness or indifference to the interests of the customer or true owner. . . . The course of business must be not only usual but reasonable".<sup>1</sup>

In the majority of cases the banker will have for his guidance certain well-defined and legally recognised practical rules which it is dangerous to disregard, but it is clear that there may be occasions when he must exercise a suitable degree of care if he is to avoid incurring liability. This statement applies more especially to the many functions which a banker discharges as an *agent* of his customer for the particular business in hand, and not essentially as a banker. As we have seen in an earlier chapter, a banker undertakes many duties in addition to those of conducting accounts, and by doing so he impliedly undertakes to discharge those duties efficiently and carefully, with due regard to the usual commercial practice in connection therewith. Thus in purchasing stock exchange securities, in conducting foreign exchange operations, in taking care of securities and valuables, and in presenting cheques for payment through the London or local clearing, the banker must use due care and follow the usual course of dealing. In no circumstances is he in a position to apply rules of his own which his customers cannot be assumed to know, and which the courts will not recognise, as being outside the ordinary course of the particular business concerned.

### Stock Exchange Transactions.

The principle referred to in the preceding paragraphs applies, as has been stated, in connection with the purchase and sale of stock exchange securities by a banker on behalf of his customer. In rendering this service the banker becomes the *special agent* of his customer for the matter in hand, and it is imperative that he should act strictly in accordance with the customer's instructions and follow the exact course of business which is usual in connection with these operations. This implies that he must exercise every care in buying or selling as the case may be, see that the bank's brokers do not exceed the limits (if any) given by the customer, use due diligence in obtaining the transfer and having it properly completed, ensure that the securities bought or sold are received by him or sent to the brokers as the case may be, and, finally, see that the correct amount is paid or received by his customer in respect of the transaction. If the banker omits in any way

<sup>1</sup> Paget, *Law of Banking*, 3rd edn., page 241.

to comply strictly with the instructions given to him by the customer, or if he is negligent in effecting a sale or securing a purchase at the given limit, he may be held liable for any loss which ensues.

In order to safeguard themselves as much as possible bankers take precise instructions from their customers for all stock exchange transactions which they are requested to put through. For this purpose a special form is used on which are specified full particulars of the security, the limits given (if any), and, in the case of registered securities, full details of the name, address and occupation of the person or persons in whose name or names the security is registered in the case of a sale, or is to be registered in the case of a purchase. Orders to purchase securities should be accompanied if necessary by an authority signed by the customer to debit his account with the purchase money, otherwise the customer's cheque for the amount must be obtained when the transfer is signed. Records of all orders issued by the branch to brokers on behalf of its customers are kept for reference purposes in a special Register of Stock and Share Transactions.

It may be added that, in accordance with established custom, banks are entitled to claim one-half of the commission charged by brokers on stock exchange transactions effected on behalf of customers, the other half going to the stockbrokers who undertake the business.

### Advising Upon Investments.

In spite of the fact that advising customers concerning their investments cannot be regarded as part of the ordinary business of bankers, it is nevertheless a common practice for them to give such advice, and Sir John Paget<sup>1</sup> expresses the opinion that, if the Courts were called upon to decide the question, they would probably find that advising upon investments is a part of ordinary banking business, if it were shown that it is usual for banks to participate in the broking commission. It is unlikely that a joint-stock bank or its managers would act otherwise than in good faith and honesty in giving such advice, and, since the bank is adequately protected against a charge of fraudulent misrepresentation by Lord Tenterden's Act, 1828, the only ground on which a customer could bring an action against a bank for wrong advice is that of negligence on the part of its agent, the manager or other person giving the advice. As was clearly pointed out by Lord Chancellor Findlay in the case of *Banbury v. Bank of Montreal*, 1918, "if he (the banker) undertakes to advise he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he takes upon himself to do so, he will incur liability if he does so negligently".

<sup>1</sup> *Law of Banking*, 3rd edn., page 82.



It is clear, therefore, that the practice of giving customers advice of this kind is fraught with considerable danger, for the average bank manager cannot possibly be in a position to advise on any one of the multitude of securities which are quoted on the Stock Exchange. At the same time, the manager always has at his disposal the assistance and knowledge of the experienced brokers who act on behalf of his bank, so that, before tendering advice to his customers concerning their investments, he should take steps to safeguard both himself and the bank by obtaining the fullest possible information. If it can be avoided, he should in no circumstances so far commit himself as directly to advise a purchase or a sale.

### Payments under Standing Orders.

Another service rendered by a banker to his customers is that of making on their behalf periodical payments of subscriptions to professional societies, clubs and charitable organisations, premiums on insurance policies, dividends, interest, house rents and ground rents.

Precise instructions for all payments of this kind should be taken from the customer and should be signed by him over a twopenny stamp. When this is done the periodical debit slips to the accounts do not require stamping, by virtue of Section 32 (b) of the *Stamp Act*, 1891.

The following is a specimen form used for standing instructions to pay insurance premiums and to debit their amount to the customer's account:—

#### AUTHORITY TO PAY FIRE AND LIFE PREMIUMS

17, East Street,  
Northtown,  
6th June, 19...

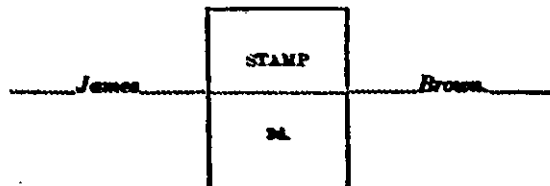
To

THE NORTHERN BANK LIMITED.

Northtown Branch.

I hereby request and authorise you, until you receive notice to the contrary in writing, to pay the Premiums for time to time as they fall due, on the Policy of Insurance No. 17654 for £250 in the *Norwich Union Life Insurance Company* and debit the same to my current account with your Bank.

Premium £4 : 11 : 3, due 1st February.



In effecting such payments on behalf of a customer it is imperative that the instructions should be explicitly complied with, and that the payments should be duly effected on the proper dates, otherwise the banker will be liable to his customer for any loss which may ensue. For this reason it is usual in practice to enter particulars of all such instructions in the branch diary and also in a special book kept for the purpose, known as the "*Standing Orders Book*".

### The Care of Customers' Valuables left for Safe Custody.

The fact that most bank offices are well equipped with highly efficient safes and strong rooms has given rise to the very wide practice under which the banker takes care of securities and valuables belonging to his customers, undertaking to safeguard them from fire, loss and theft, and to return them to the customer when required.

A detailed discussion of this matter is deferred to Chapter 25, but it may be pointed out that in relation to all transactions of this kind the banker must act diligently in accordance with the usual course of business, otherwise he may render himself liable for loss.

### Garnishee Orders and the Customer's Account.

A Garnishee Order is an order issued by the Court in favour of a creditor who has obtained judgment against his debtor, whereby the creditor is enabled to attach for the discharge of his debt funds of the debtor which are in the hands of a third party, *the garnishee*, and whereby the third party is warned not to part with the funds until permitted to do so by the Court. Thus if Brown obtains judgment in respect of a debt owed to him by Atkins, and has information that Atkins has funds to his credit at a bank, Brown may apply to the Court for a garnishee order attaching the funds in the hands of the bank.

Garnishee proceedings actually comprise two distinct steps. The first is the issue by the Court of a *Garnishee Order nisi*, which attaches the funds in the hands of the garnishee but gives him an opportunity of appearing before the Court to show cause why the funds in his hands should not be handed over to the judgment creditor. The second step is taken when the order is made *absolute* by the Court, and the garnishee is compelled to transfer to the judgment creditor or to pay into Court either the whole of the funds in his hands or such portion thereof as is necessary to satisfy the judgment debt.

A garnishee order *nisi* takes the following form, the particulars in italics being varied to suit the particular case :—

## GARNISHEE ORDER (ATTACHING DEBT)

No. 2976.

IN THE HIGH COURT OF JUSTICE,  
KING'S BENCH DIVISION,  
Northtown DISTRICT REGISTRY.

*Between*

*James Henry Brown*, JUDGMENT CREDITOR.  
*William George Atkins*, JUDGMENT DEBTOR.  
*Northern Bank, Ltd., Northtown*, GARNISHEE.

Upon hearing Mr *L. Mitchell* as Solicitor for the above-named Judgment Creditor, and upon reading the affidavit of the said *James Henry Brown* filed the 14th day of *August*, 19 . . .

It is ordered that all debts owing or accruing due from the above-named Garnishee to the above-named Judgment Debtor be attached to answer a judgment recovered against the said Judgment Debtor by the above-named Judgment Creditor in the High Court of Justice, on the 1st day of *May*, 19 . . . for the sum of £176, 10s., debt and costs on which Judgment the said sum of £176, 10s. remains due and unpaid.

And it is further ordered that the said Garnishee attend the District Registrar in chambers, at the County Court Offices, *Northtown*, on *Thursday*, the 7th day of *September*, 19 . . . at 11.30 o'clock in the forenoon, on an application by the said Judgment Creditor that the said Garnishee pay the debt due from him to the said Judgment Debtor or so much thereof as may be sufficient to satisfy the Judgment.

Dated this 30th day of *August*, 19 . . .

*B. F. Jenkins*,  
DISTRICT REGISTRAR.

So far as bankers are concerned several very important points rise in connection with these orders. In the first place, it is to be noted that the order attaches all debts "*owing or accruing due*", and accordingly the whole of a customer's balance on current account is attached by the order, although the amount of the debt may be considerably less than the balance standing to the customer's credit. The result is that, as from the date of receipt of the order, the balance on the account must not be interfered with in any way by the banker or the customer, and any cheques subsequently presented must be returned unpaid, even if they were issued before the date of the order, and even if the balance in excess of the amount garnisheed is ample to cover the payments. If, however, the balance to the customer's credit is less than the amount for which judgment has been obtained, the banker should dispose of the matter at once by paying the amount into Court, if necessary exercising his right to deduct therefrom any debt which may have been due to him at the date of the order (see *ante*, page 178). Such a payment should not usually be made until the order has been made absolute by the Court, but once payment is made, it operates as a valid discharge of the obligation previously existing between the banker and the customer.

On the other hand, if the balance to the customer's credit is in excess of the amount of the judgment debt, the usual course,

particularly if the banker is anxious to safeguard his customer's interest, is at once to inform the customer that the order has been served and to open a new account through which all future transactions are passed, the old account being allowed to remain dormant until the judgment debt is satisfied. During the garnishee proceedings the banker may, if he wishes, receive credits to and pay cheques on the new account; if the customer's standing warrants his doing so, he may, with the customer's consent, even grant him an overdraft on this account in reliance upon the amount by which the credit balance of the old account exceeds the judgment debt. When the garnishee proceedings are completed the two accounts may be combined and operations on the old account conducted as in the past.

The words "*owing and accruing due*" are of special significance, for they clearly imply that the garnishee order cannot touch any amounts which in the future may become due by the banker to the customer, nor can it touch any moneys which are not at the time of receipt of the order actually *due and payable* by the banker. In the *Joachimson* case, as stated previously, money left with a banker is not a debt due and payable until a demand for repayment has been made by or on behalf of the customer, and it would therefore appear that unless this demand has been made, any balance in a banker's hands is not money accruing due, such as would be attached by a garnishee order. This difficulty, however, was provided for in the *Joachimson* case by the Court of Appeal, which held that the garnishee order *nisi* itself operates as a demand for repayment sufficient to render money on current account accruing due.

A garnishee order does not, however, attach deposit accounts subject to notice, unless the notice has been given by the customer when the order is received, and it does not affect money on deposit receipts which are repayable upon fulfilment of certain conditions—such as the giving of notice, or the return of the receipt—unless those conditions have been fulfilled. But it does attach moneys on deposit account if they are repayable on demand, or at call, or if they are repayable on a fixed date, for, in such cases, the funds are properly regarded as "*accruing due*". Moreover, such an order does not attach funds of the customer which may *subsequently* come into the banker's hands, as, for example, dividends which may thereafter come to him for the customer's credit, the proceeds of coupons which he has forwarded for collection, or the proceeds of sales of stock-exchange securities which he has effected. All such items are not regarded as due or accruing due under the terms of the order.

It is scarcely necessary to point out that if the customer's current account is overdrawn, or if the credit balance thereon does not exceed the amount of debts due by the customer to the banker in the same right, there will be no funds which can be attached by a garnishee order. As has been indicated on page 178,

the service of a garnishee order is one of the circumstances in which a bank is entitled to exercise the right of set-off without notice to the customer, subject to the exception already mentioned, that a banker cannot, without the express agreement of his customer, set-off a credit balance on current account against a debt due to him on a definite *loan* account. Again, a garnishee order cannot operate to attach funds held by a customer on joint account with other persons, or funds held by him as a trustee, or funds of a customer against whom a bankruptcy petition has been issued. On the other hand, it was held in *Jones v. Coventry*, 1909, that amounts credited to the customer in respect of uncleared cheques would be attached by such an order, on the ground that cheques so credited are being collected by the banker for himself and not for his customer. It is doubtful, however, whether this ruling would now be followed in view of the judgment in *Underwood v. Barclays Bank*, 1925, which recognised a banker's right to return cheques drawn against uncleared credits.

It sometimes happens that garnishee orders are served at the head office of a bank in respect of accounts which exist at one of the branches, and in such cases it is desirable that the head office advise the branch of the service of the order either by telegram or telephone, in order that the customer's account may be immediately stopped. Nevertheless, there is little doubt that the head office would be allowed reasonable time in which to communicate with the branch before the branch could be held bound by the order.

Finally, although the point is not of great practical importance, it may be added that the omission of a banker to comply with the demand made in a garnishee order *nisi* renders him liable to have execution issued against him by the Court or a judge, under which, with no previous writ or process, the amount due from him will be levied in satisfaction of the judgment.

### The Customer's Pass Book.

In order that each customer may himself review from time to time the state of his account at the branch, and also that he may, if he so desires, check the accuracy of the various items which have passed through his account, the bank provides him with a small account book described as a *Pass Book*, which is an actual copy of the debit and credit columns of the customer's account in the bank ledger, and is so called because it "passes" periodically between the bank and the customer.

It is sometimes stated that the pass book is a *copy* of the customer's *account* as it appears on the bank's books, but this is not strictly accurate, for not only are the various interest and decimal columns omitted, but the debit and credit items appear

on opposite pages, as in the example below, and not in parallel columns on the same side, as in the case of most bank ledger accounts. (See *ante*, page 77.)

## SPECIMEN PASS BOOK HEADING AND RULING

WILLIAM BROWN, Esq.

In account with

## THE NORTHERN BANK, LIMITED

Dr.

Cr.

Date.	Particulars. <sup>1</sup>	£	s.	d.	Date.	Particulars.	£	s.	d.
19..					19..				
Jan. 1	To Inst. of Bankers Subscription . . . . .	0	10	6	Jan. 1	By Balance <i>b/d.</i> . . . .	170	12	11
" 2	" James Brown . . . . .	175	3	6	" 3	" Cash . . . . .	25	2	6
" 3	" 50 Dunlop Ordy. Shs. purchased (C.N. 17) . . . . .	65	7	8	" 7	" Bill Collected . . . . .	210	0	0
					" 10	" Cheques . . . . .	71	8	9

<sup>1</sup> In some cases only the numbers of the cheques paid appear in this column, no other particulars being given.

It will be noted that in this example the debit items appear on the left-hand side and the credit items on the right-hand side, corresponding in this respect to the arrangement of the columns in the ledger account already given. In other words, the pass book represents the customer's account *with the bank*, and is accordingly credited with his payments in and debited with money paid out on his behalf. The pass books issued by some banks, however, are intended to represent the position of the bank in account with its customers, and accordingly the heading appears in the following form, while debit and credit items appear on reverse sides, thus :—

## ALTERNATIVE PASS BOOK HEADING AND RULING

## THE NORTHERN BANK, LIMITED

In account with

WILLIAM BROWN, Esq., "Riverdale," Northtown.

Dr.

Cr.

Date.	Particulars.	£	s.	d.	Date.	Particulars.	£	s.	d.
19..					19..				
Jan. 1	To Balance <i>b/d.</i> . . . . .	170	12	11	Jan. 1	By Inst. of Bankers . . . . .			
" 3	" Cash . . . . .	25	2	6		Subscription . . . . .		10	6
" 7	" Bill Collected . . . . .	210	0	0	" 2	" James Brown . . . . .	175	3	6
" 10	" Cheques . . . . .	71	8	9	" 3	" 50 Dunlop Ordy. Shs. purchased (C.N. 17) . . . . .	65	7	8

It will be seen that when this form is used the bank is *debited* with money paid in by its customer and is credited with payments made on his behalf. It will be clear that the statement of the account in this form makes the pass book correspond very closely to the account of the bank in the *customer's* own ledgers, in which he will, of course, credit the bank with all payments made on his behalf and debit it with all moneys which it receives to his credit. This method has therefore the advantage that the customer can more easily compare the items in his own books with those made by the bank in his pass book.

The reader will appreciate at once that the pass book is a very important link between the bank and its customers. Accordingly, it is imperative not only that the pass book should be absolutely accurate, its items corresponding exactly with those in the ledger account, but also that it should be neatly written up, each page being carefully totalled and the totals carried forward. When all the entries are made the totals of the two sides are lightly interlined in pencil. No pass book should be issued until these totals have been agreed with the relative totals in the ledger account, and the balance between the totals agreed with that in the ledger by a responsible clerk, who indicates his fulfilment of these duties by placing his initials and the date in the appropriate column of the ledger, against the last item entered into the pass book before it is handed to the customer.

### Entries in a Customer's Pass Book.

As the bank accepts responsibility for the compilation of the pass book, it follows that the customer should not be permitted to make any entries therein, and that no items should be entered in the pass book until they have first of all been made in the ledger account itself and checked in the course of the daily balance. • The practice of making entries in the pass book from cheques or credits which have come in during the course of the day, but which have not yet been posted and properly checked, is a fruitful source of trouble and annoyance, and is one which should not be countenanced.

The importance to a banker of ensuring the correctness of the entries in a pass book will be appreciated when it is pointed out that at law such entries are *prima facie* evidence *against* the banker, and if the customer has in good faith altered his position in reliance upon the accuracy of the balance as shown by the pass book, the banker will be estopped from denying its accuracy. and will be compelled to bear any loss which may arise by reason of the inaccuracy of the entries.

As Sir John Paget points out, this position is most unsatisfactory from the standpoint of the banker, for the proper function of the pass book is, or at least should be, "to constitute a conclusive, unquestionable, record of the transactions between

banker and customer, and it should be recognised as such. After full opportunity of examination on the part of the customer, all entries, at least to his debit, ought to be final and not liable to be subsequently reopened, at any rate to the detriment of the banker".<sup>1</sup> If this view were adopted, bankers would no doubt be able to regard the return of a pass book by a customer without comment, as *prima facie* evidence that the customer had agreed the items and found the entries correct.

Unfortunately, however, the law as it has been interpreted in various cases gives the banker no such protection. From the decisions it would appear that, although a banker is entitled to point out that wrong entries in a pass book have been made by innocent mistake and to have them rectified, nevertheless, if the customer's position has been changed to his detriment, the banker is bound to honour cheques drawn by the customer in good faith in reliance upon the correctness of the entries, and to bear any financial loss which may arise in consequence of the wrong entries. Circumstances of this kind may arise, for example, in the case of an army officer who innocently issues cheques on the strength of the balance disclosed by his pass book, although that balance is undoubtedly swollen by a credit posted in error to the account. In such a case the banker can show that a mistake has been made, but he cannot dishonour cheques issued by the officer prior to receipt of the notice of the mistake, nor can he compel the customer to recoup him for paying cheques against which there are no funds.

The general position seems to be that if a customer, in reliance upon entries in his pass book which are actually incorrect, has been induced to draw out more money than he otherwise would have drawn, then the banker must bear the loss, and it is no defence for the banker to prove that the customer has had an opportunity of examining the pass book, for apparently there is no *obligation* upon the customer to see that the entries are correct. Furthermore, even if a banker discovers that he has wrongly credited an amount to the account of the customer, he will run considerable risk of being held responsible for injury to his customer's credit if, after discovering the mistake, he dishonours cheques drawn by his customer in reliance upon the position disclosed by the pass book, and before he (the customer) receives notice of the error.

Again, if cheques are wrongly debited to a customer's account the customer can demand that his balance be restored, even if he has received his pass book from the bank and has had an opportunity of verifying the correctness of the debits. Consequently, if over a long period a bank has paid various cheques bearing a forged signature of its customer, and from time to time the customer has obtained his pass book but has raised no objection to the debits relating to such cheques, the banker

<sup>1</sup> *Law of Banking*, 3rd edn., page 344.



cannot claim that by so doing the customer has acted negligently, and may be regarded as having induced the bank to pay subsequent forged cheques.

As the law stands at present, therefore, the pass book is not evidence of a settled account as between banker and customer; there is no duty on the customer's part to examine his pass book, and the banker cannot contend that his customer, by his silence or by refraining from criticising the entries, has virtually adopted them as being correct.

On the other hand, the law will certainly protect a banker against a customer who is endeavouring to take a fraudulent advantage of a mistake in his pass book. Before a customer can succeed he must act innocently and without negligence, but the principal difficulty appears to be in determining what acts of a customer amount to negligence. Apparently the Courts will not recognise that a *private* customer who has received his pass book shall be regarded as having adopted the entries, even if he has expressly or impliedly acknowledged their accuracy. It is possible, however, that a *business* man would be held to have been negligent if he had not examined his pass book before returning it to the bank, and, in any case, an actual acknowledgment of the accuracy of the entries by such a person would undoubtedly operate against him.

It will be clear from the foregoing that the greatest possible care should be taken in making entries to the accounts of customers and in entering up of their pass books. Whenever an error is discovered the customer should be notified immediately and asked to return his pass book to the bank for rectification. In no circumstances should mistakes in a pass book be erased; they should be neatly ruled through and the correct entry clearly made either above or below, the initials of a responsible official being placed against the alteration. Furthermore, the bank can do much to safeguard its position by taking steps to ensure that the customer has frequent opportunities for examining his pass book, if necessary making oral or written application to the customer for the book to be sent in to the bank in order that it may be made up and returned.

In the case of operative accounts the pass book should be written up and returned at frequent intervals, sometimes every day, but it is, of course, unnecessary to go to this trouble in the case of less operative accounts. Most bankers, however, make it a practice to write up and rule off all pass books at the quarterly or half-yearly balance, and endeavour to ensure that the entries will be examined by the customer by submitting the pass book to him with a request that he shall sign and return an enclosed form described as a *docquet*, in which he acknowledges to have examined the entries and to have found them correct. It is questionable whether the bank obtains any real protection from the signing of these forms, many of which, unfortunately, are

signed without as much as a glance at the entries. Nevertheless, if the well-known reluctance of solicitors to sign these documents is any criterion, it may be assumed that there is something to be gained by the arrangement from the banker's point of view.

### Deposit Account Pass Books.

In addition to current account pass books, to which the foregoing explanation chiefly relates, all banks now issue pass books in respect of deposit accounts, as the older practice of issuing *Deposit Receipts* for sums left with the bank at interest and subject to notice of withdrawal (see Chapter 19) is being gradually superseded; for although there are very few entries in the majority of deposit accounts, the pass book has the advantage over the receipt that it provides the customer with a permanent record of his credits and withdrawals, together with particulars of the interest credited to him from time to time.

Deposit account pass books are usually distinguished from the current account variety by covers of different design and tint, while they also bear a number corresponding to that given to the account in the bank's ledgers, and contain a printed page setting forth the terms upon which such accounts are accepted by the bank, specifying, in particular, the rate of interest allowed together with the period of notice required for withdrawals. In spite, however, of the fact that such accounts are usually accepted on the understanding that the bank can demand the specified period of notice for all withdrawals (usually seven days), the right is rarely exercised by the banks in this country, and customers are generally allowed to draw out deposits upon demand or to make immediate transfers from these accounts to their current accounts. Frequently they are even permitted to draw cheques against their deposit balances.

### Loss of a Pass Book.

It sometimes happens that a customer reports the loss or destruction of his pass book, and in such cases it may become necessary to issue a duplicate. This should not be done, however, until the bank is satisfied that every possible search has been made, or that a book reported as destroyed is actually beyond recall. In any case, the word "*Duplicate*" should be clearly written in red ink upon the cover of the second copy, and a note, duly initialled by a responsible official, made in the corresponding ledger account.

### Statements of Account.

It may be added that some customers, and more especially those residing overseas, require their banks to submit statements on loose sheets of the transactions upon their accounts during a prescribed period, as, for example, every three months, every week, and in some cases every day. So far as overseas customers are concerned, this arrangement has the advantage of saving the bank a certain amount of postage, etc.; but the practice has little to commend it in the case of inland customers, and it is accordingly adopted only in special circumstances and in response to a special request. Nevertheless, whenever such statements are issued they should be thoroughly checked and signed by the manager or other responsible officer of the bank.

### Closing an Account.

It has already been pointed out that in the case of a credit account the banker differs from an ordinary debtor in that he cannot at any time summarily close the account and pay back the balance to the customer, nor can he at any time he thinks desirable terminate the account and dishonour any cheques subsequently presented. In all cases the customer is entitled to have reasonable notice that the banker wishes the account to be closed, the correct procedure being to advise the customer in writing that no further credits to his account will be accepted, and that he should withdraw the balance standing to his credit, subject to leaving with the banker sufficient funds to pay any outstanding cheques. If reasonable steps of this nature are not taken and the banker dishonours cheques of his customer without proper notice, he will render himself liable to an action for damages for injury to the customer's credit. As to what is reasonable notice is a question of fact, but in *Prosperity, Ltd. v. Lloyds Bank, Ltd.*, 1923, as much as one month was considered insufficient notice in the circumstances.

Similarly, in the case of an ordinary overdraft, the banker who wishes the account to be closed should give his customer reasonable notice, and he should not dishonour cheques drawn by the customer unless the limit which he has agreed to advance has been exceeded or would be exceeded by the payment of the cheques. If a fixed loan has been granted and the proceeds thereof credited to a current account, the customer is entitled to draw out the whole of the credit balance unless he is given reasonable notice by the banker that he wishes to call in the loan. As to what is reasonable notice will depend largely on the particular circumstances of the case, and upon the usual course of business in such circumstances, but a banker needs to proceed very warily before he dishonours a customer's cheques if there is

an arrangement existing between them for a loan or overdraft up to a certain amount.

An account, whether it is in debit or credit, is legally closed by the death, insanity, or bankruptcy of the customer, or if the customer is a limited company, by notice of its liquidation or winding-up. A credit account may also be closed, as already explained, upon receipt by the banker of a garnishee order attaching the whole of the balance, or it may be closed upon receipt by the banker of a notice that the customer has *assigned* the available balance.

The assignment of the balance on a current account may be made under Section 136 of the Law of Property Act, 1925, which repealed and re-enacted the substance of Sub-sections 3-7 of Section 25 of the Judicature Act, 1873. The effect of the provisions is that an *absolute* assignment of a debt or any other legal chose in action may be effectively made by the creditor, provided that the assignment is made in writing, and that written notice thereof is sent to the debtor or trustee holding the funds or property assigned. Such an assignment cannot be made merely by way of giving a charge, but if an assignment is properly made it enables the assignee to sue in his own name and to give a good discharge for the debt without the concurrence of the assignor. On the other hand, the assignment is *subject to equities*, i.e., the assignee takes the rights to the debt or chose in action, subject to any defence or set-off which the party liable could have raised against the assignor, and subject also to the rights of third parties.

In accordance with these provisions the debt owing by a bank to its customer may be assigned by the customer to a third party, and if due notice of such an assignment is given to the banker, he must pay the balance to the assignee and to him *only, unless* the banker has any right of lien or set-off in respect of the balance, or the assignor gives him notice not to pay. In the former case, the banker can at once exercise his rights over the balance, paying the surplus (if any) to the assignee, but in the latter case, his best course is to pay the money into the High Court or insist that the parties *interplead*, i.e., bring an action to determine the ownership of the balance on the account. The assignment of a balance on current account means that the contract between the banker and his customer is at an end, and that the assignee can give the banker an effective discharge which frees him from all future liability.

So far as the customer is concerned, he may of course withdraw his balance on current account at any time without giving notice to the banker, although the banker should request that a sufficient balance shall be left with him to enable him to pay any outstanding cheques. Similarly, a customer may at any time close an over-drawn account or loan account by paying to the banker what is due thereon, but, in this case also, it is in the customer's own

interest that proper provision be made in respect of any cheques which may be outstanding. Naturally, if the customer refuses or neglects to make provision of this kind, the banker will be within his rights in returning cheques subsequently presented, marking them "Account Closed". As a rule, it is advisable also to ensure that no cheques shall be subsequently drawn by the customer on the bank, by insisting that any unused cheques shall be at once returned to the bank, the value thereof being credited to the customer or handed to him in cash.

## CHAPTER 11

### BILLS OF EXCHANGE AND THE PARTIES THERETO

NOTE.—In this and subsequent chapters section references are to sections of the *Bills of Exchange Act, 1882*.

THE Bill of Exchange is the most important type of negotiable instrument known to the modern trading community, and next to the cheque, which is, of course, merely a special form of bill of exchange, it is also the most important instrument which brings the banker into legal relationship with his customers. The great utility of the bill lies in the fact that it may pass through various hands for value before it is finally discharged, and it thus forms a convenient and safe means of making commercial payments and transmitting funds from place to place. In addition to being a widely used medium of payment, it is an instrument of credit the functions of which are recognised in all places where men trade; it enables credit to be given and taken, permits payment to be deferred and capital to be rapidly turned over in business operations. Moreover, the facts that it is easily convertible into cash by sale or discount, and that it automatically turns into cash at its maturity, make it an admirable form of investment.

But it is in its use as an instrument of credit that the bill of exchange payable after date shows to greatest advantage, particularly in comparison with the cheque, for while the latter is usually presented for payment within a few days of its issue, the essential attribute of a long bill is that it shall not be presented and paid until the expiration of an agreed period. During this period, known as the "term" or "currency" of the bill, the drawee has the use in his business of the sum for which it is drawn and is enabled to collect the necessary funds in readiness to pay the bill on the due date. On the other hand, the fact that a bill is not immediately payable does not prevent the payee or holder from at once converting it into cash if he so wishes, for most bills of exchange can be discounted with a bank or sold to a bill broker with no loss other than that of interest for the period still outstanding before maturity.

It is for these reasons that the bill of exchange is so widely used in international transactions, and in settlements between wholesalers and retailers. Thus, Wholesaler Jones may send his goods to Retailer Brown and draw a bill on Brown for the value of the goods, payable in three months. Jones can at once obtain payment if he so desires by discounting the instrument at a bank,

or by negotiating it for value to a third party, while, during the three months before the bill matures, Brown has time to sell the goods at a profit and collect sufficient funds to meet the bill when it is presented for payment.

A banker is brought into legal relationship with his customers by the bill of exchange when he undertakes to discount, collect, or pay bills on behalf of his customers. The frequency of transactions of this kind in everyday banking practice makes it imperative for every banker to be thoroughly acquainted with the legal principles and provisions applicable to bills of exchange, as laid down by decisions in the Courts and in the Bills of Exchange Act, 1882.

### The Meaning of Negotiability.

Before proceeding to a consideration of the law relating to bills of exchange, we may usefully pause to consider the meaning of that characteristic of negotiability which gives the bill of exchange so much of its importance. As will be observed from the brief reference on page 98, a negotiable instrument is one of such a *nature* that the absolute property in it can be obtained by any person who takes it in good faith and for value, provided that the instrument is in itself valid (e.g., free from forgery), and that it is in such a *state* that it can be properly transferred by the true owner by mere delivery (e.g., that it is payable to bearer, or, if payable to order, has been duly indorsed by the transferor in order to put it in a proper state for delivery).

A negotiable instrument will therefore have the following four characteristics which are implied in the term *negotiable*: (a) the property therein and not only the possession passes from hand to hand by mere delivery of the instrument, or by indorsement followed by delivery; (b) no defect in the title of the person transferring the instrument or of any previous holder will affect the title of a person who takes the instrument as a "holder in due course" (see page 215), i.e., in good faith for value and without notice of any defect in the instrument; (c) the title of such a holder in due course is "free from all equities", that is, he is not affected by any defence that might be available against a previous holder; (d) a holder in due course can sue on the instrument in his own name.

This means that a holder in due course obtains a perfect title, even if he takes the instrument from a thief. The only case in which his right may be defeated is when there is prior forgery on the instrument, for in the case of forgery no person can claim a title to the document forged excepting the true owner. Thus if there is any doubt as to whether an instrument is negotiable, a rough and ready test to apply is—can a perfect title be obtained through a thief? If so, the instrument is negotiable, but if not, the instrument is not negotiable.

☞ A number of instruments have by long-established custom come to be recognised as negotiable, while the Courts in several modern decisions have judicially recognised the general practice of merchants to regard as negotiable various instruments payable to bearer. Other instruments are recognised as negotiable by Act of Parliament, notably bills of exchange, promissory notes, and cheques. The following are amongst the most important instruments now legally recognised as negotiable in this country : Bills of Exchange, Promissory Notes, Cheques, Exchequer Bills, Bank Notes, Dividend Warrants, Share Warrants, East India Bonds, Bankers' Circular Notes, Debentures payable to Bearer. The tendency is for the list of negotiable instruments to be increased whenever it is shown that, by the custom of merchants, an instrument is transferable by delivery and that it passes free from defects in the title of the transferor. Foreign instruments are negotiable here only in so far as they are recognised as such by English general mercantile usage. Share Certificates and Transfers are not negotiable. Bills of Lading, and other documents by the transfer of which a title to goods can be given, are passed by delivery with or without indorsement, and persons taking them may sue in their own name without previous notice of the transfer to the party chargeable ; but they are not by reason of this negotiable, as holders in good faith and for value have no better title than that of their transferors ; so that if, at any time, such a document is stolen, subsequent holders have no title. In addition any set-off for freight, etc., can always be pleaded, against any holder in good faith and for value.

### Negotiability compared with Assignability.

The true meaning of *negotiability* is well brought out by a consideration of the difference between negotiability and *assignability*. By virtue of the rule of equity, a *chose in action*, i.e., a legal right to property which can be enforced by action in a court of law, such as a debt or shares in a joint-stock company, can be assigned by one person to any other, orally or in writing, provided there is evidence of the intention of the creditor or person entitled to the funds to transfer his right thereto, and provided the debtor is given to understand that the right has been transferred. Such an assignment is described as an *equitable assignment*. Moreover by virtue of the Law of Property Act, 1925, a debt or other chose in action may be *legally assigned* so as to enable the assignor to sue in his own name, provided the assignment is made in writing, that it is absolute and not by way of charge, and that written notice thereof is given to the debtor or the person holding the funds. The following is a useful summary of the differences between legal assignability and negotiability.



**ASSIGNABILITY.**

1. The transfer must be in writing, and in conformity with any statute governing the particular class of contract, e.g., the provisions of the Law of Property Act, 1925, or with any express conditions contained in the contract.

2. **EQUITIES.**

The transfer is "*subject to equities*", i.e., the assignee takes the rights subject to any defence or set-off which the party liable could have raised against the assignor, and subject to the rights of third parties.

3. **TITLE.**

The assignee can acquire only the same title as was possessed by the assignor.

**NEGOTIABILITY.**

The property (i.e., absolute ownership) passes by mere delivery, or by indorsement and delivery of the instrument, without notice to the party liable.

A "holder in due course" holds the instrument, "free from equities", i.e., he takes the rights free from any defence which could have been raised against a former party, and without being subject to the rights of third parties.

A "holder in due course" takes the rights free from any defect in the title of a prior holder.

A practical example will serve to illustrate the foregoing distinctions. A owes B £50. B can transfer this right against A to C by assignment in writing, but C's right to the £50 is subject to any set-off or counter-claim which A may have against B. If, however, A gives B a promissory note for £50, B may transfer the note to C, by mere delivery if it is payable to bearer, or by indorsement and delivery if it is payable to order, and provided C takes the instrument *in good faith* (whether for value or not), he can claim payment of the £50 from A, and is not affected by any claim A may have against B.

**Negotiability compared with Transferability.**

The foregoing example will serve also to illustrate a further important distinction; that between negotiability and transferability. Many instruments, which are *not negotiable*, may be passed from hand to hand for value without the formalities of assignment in such a way that the property in them is transferred from one person to another. Such instruments are *transferable*: if everything is in order the transferee obtains a good title, but the absence of negotiability means that the transfer is made "subject to equities", and the right of the transferee is liable to be defeated by any prior defects of title or by any defences which can be set up against any prior holder.

An appropriate instance is that of the British Postal Order, on the face of which are printed the words, "Not Negotiable". In spite of this warning that the instrument is not negotiable in its origin, it is well known that these orders are frequently passed from hand to hand for value: such transfers are perfectly valid so long as all parties act honestly and in good faith, but the inter-

vention of theft, fraud, or illegality is sufficient to defeat the right of any subsequent holder of one of these orders.

*The true owner* of a negotiable instrument is the person who is entitled to the property in the instrument. There is a presumption that the bearer of an instrument payable to bearer is the true owner, and therefore any negotiation by him is valid and effectual, as far as third parties acting in good faith are concerned. The true owner of an instrument payable to order is generally the person to whom the instrument is by its terms made payable. A holder in due course is always the true owner, even in respect of a stolen negotiable instrument which has been transferred to him, provided his title does not depend on a forgery, and the person from whom the instrument was stolen has no rights over the instrument in precedence of those of the holder in due course.


It must be borne in mind that an *absolute* title to a negotiable instrument, good against all the world, is not passed unless the instrument is taken for valuable consideration, and in good faith. Valuable consideration in regard to bills of exchange is always presumed until the contrary is proved; and although, in the case of an accommodation bill (i.e., one which a person has signed without receiving value therefor, or for the purpose of lending his name to another party), valuable consideration is absent as between the party accommodating and the party accommodated, yet as soon as value has been given for the bill a subsequent holder obtains a valid title good against every one, including the accommodating party.

Any *mala fides* must be proved very clearly in order to dispute the title, and the fact that a person has not exercised great caution, or has shown negligence, will not necessarily be sufficient to upset the title. This, however, depends on the circumstances. For instance, in *London Joint Stock Bank v. Simmons* (1892), a broker, who held negotiable instruments belonging to his clients, in fraud of the owner pledged certain of them with his bankers, who made no inquiries as to whether they were his or whether he had authority to deal with them. The broker absconded and the bankers realised the securities. The true owner, who had merely left the securities with the broker in the ordinary way of business, brought an action against the bankers; but it was held that, there being no circumstances to create suspicion, the bankers were entitled to realise the securities and retain the proceeds. This case followed that of *Baker v. Nottingham Banking Co.* (1891), which also decided that the fact that the pledgor was a broker was not enough to affect the bank with notice that the securities pledged did not belong to him or cast on the bank the duty of making inquiries. But in a similar case, *Sheffield v. London Joint Stock Bank* (1888), the bankers had notice that the broker was himself only a pledgee repledging, and therefore they could not get a better title than the broker had.

## Specimen Forms of Bills of Exchange.

The following are specimens of the more usual types of inland bills of exchange, a study of which should help the reader to understand more easily the principles of law discussed in this chapter.

### 1. Ordinary Form of Bill after Date

	<p>£200</p> <p>LONDON, 1st April, 19...</p> <p>Three months after date pay to James Brown or Order the sum of two hundred pounds for value received.</p> <p>To WILLIAM ARNOLD, 62 ST JAMES' STREET, LIVERPOOL.</p>	<p>FRED DAVIES.</p>
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In this simple example, Fred Davies is described as the *drawer* of the bill, who orders the *drawee*, William Arnold (usually a *debtor* of the drawer) to pay a sum certain in money (£200) to or to the order of the *payee*, James Brown (usually a *creditor* of the drawer) at a determinable future time, i.e., three months after the date of the bill, viz., 1st April, 19...


After he has drawn and signed the instrument, the drawer, Fred Davies, will arrange to have the bill presented to the drawee, Arnold, who will express his willingness to comply with the order by writing his signature across the face of the instrument, adding, if he wishes, the word "*Accepted*" and the date. By so doing Arnold is said to have "*accepted the bill*", and thereafter is liable in respect of his signature as *acceptor* to all persons who may take the bill as holders.

After acceptance (or possibly before) the drawer, Davies, may send the bill to the payee, James Brown, in which case the latter may either hold it until it falls due for payment, or may decide to discount it with his banker or to hand it to another person in payment of a debt. If he decides to transfer the bill and the rights therein to another, he will sign his name on the back, i.e., he will "*indorse*" the instrument and pass it to the "*indorsee*". By thus transferring the instrument, Brown is said to "*negotiate it for value*", and by affixing his signature to the bill and delivering it he thereby incurs the liabilities of an *indorser*; in other words, he guarantees that the instrument will be duly paid at maturity, or if not, that he himself will pay the amount to anyone who has taken the bill for value.

If, however, Arnold does not feel disposed to carry out the instructions of the drawer, he will refuse to accept the instrument, in which case he is said to "*dishonour the bill by non-acceptance*", and does not then become liable on the instrument to any party. Again, even after accepting the bill and thereby promising


to pay it on its due date, he may decide not to pay it when it is presented for payment, in which case he is said to "dishonour the bill by non-payment"; but in this instance there will be an immediate right of action against him in a Court of law, for he is liable on his signature as acceptor for the full and due payment of the bill when it matures.

## 2. Demand Bill Payable to Bearer

	£200	LONDON, 1st April, 19...
	On demand pay bearer the sum of two hundred pounds for value received.	
	To WILLIAM ARNOLD, 62 ST JAMES' STREET, LIVERPOOL.	FRED DAVIES.


In this case, no payee is specified, so that the amount of the bill must be paid to the bearer of the instrument, i.e., the person in possession thereof.

## 3. Order Bill after Sight

	£200	LONDON, 1st April, 19...
	Ten days after sight pay to James Brown or Order the sum of two hundred pounds for value received.	
	To WILLIAM ARNOLD, 62 ST JAMES' STREET, LIVERPOOL.	WILLIAM ARNOLD.


Example No. 3 is a form of bill in which the drawer and drawee are the same person (W. Arnold). The holder of such an instrument may treat it either as a bill of exchange or promissory note by virtue of Section 5 (2) of the Act.

## 4. Order Bill after Date with Fictitious Drawee

	£200	LONDON, 1st April, 19...
	Three months after date pay to James Brown or Order the sum of two hundred pounds for value received.	
	To NEPTUNE, DAVY'S LOCKER.	FRED DAVIES.


This is a form of bill with a *fictitious drawee*, and like Example No. 3, is governed by Section 5 (2).

5. Order Bill after Date with Fictitious Payee

	£350	LONDON, 1st April, 19...
	Three months after date pay to Old King Cole the sum of three hundred and fifty pounds for value received.	
	To WILLIAM ARNOLD, 62 ST JAMES' STREET, LIVERPOOL.	FRED DAVIES.

In this specimen, the payee is a *fictitious person*, and the bill is accordingly payable to bearer. [Section 7 (3).]

6. Order Bill after Date with Interest

	£125	LONDON, 1st April, 19...
	Three months after the death of John Jones pay Thomas Brown, David Evans or Samuel Johnson, or the order of either of them, the sum of one hundred and twenty-five pounds with interest at 3½ per cent., for value received.	
	To WILLIAM ARNOLD, 62 ST JAMES' STREET, LIVERPOOL.	FRED DAVIES.

Example No. 6 is a form of bill with alternate payees, and is also an order to pay a sum certain with interest at a determinable future time, i.e., three months after the death of John Jones, an event which is certain to occur.

The Interpretation of Terms used in the Act.

Before the provisions of the various sections of the Bills of Exchange Act can be clearly understood, it is necessary to be acquainted with the precise significance of certain important "terms" which are frequently used in the sections. A number of these are explained in Section 2 of the Act, and although the meaning of the definitions will become clear to the reader only after a perusal of the following pages, the section has to be referred to so many times that its provisions are given in full below :—

- 2. In this Act, unless the context otherwise requires,—
  - "Acceptance" means an acceptance completed by delivery or notification.
  - "Action" includes counter-claim and set-off.
  - "Banker" includes a body of persons, whether incorporated or not, who carry on the business of banking.

"Bankrupt" includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

*(Technically, the possessor of a bill or note payable to order is not the bearer of it.)*

"Bill" means bill of exchange, and "note" means promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Issue" means the first delivery of a bill or note, complete in form to a person who takes it as a holder.

"Person" includes a body of persons whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

### The Requisites as to Form of a Bill of Exchange.

The definition of a bill of exchange is thus given by Section 3 (1) of the Bills of Exchange Act, 1882 :—

3. (1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.

From this definition it will be seen that there are *eight* essential requirements of an instrument which is to constitute a valid bill within the meaning of the section : (a) the bill must be an *order to pay* ; (b) the order must be *unconditional* ; (c) the instrument must be *in writing* ; (d) it must be *addressed by one person to another* ; (e) it must be *signed by the person giving it*, i.e., the drawer ; (f) payment must be made *on demand or at a fixed or determinable future time* ; (g) payment must be of a *sum certain in money* ; (h) the bill must be made *payable to order or to bearer*.

Every one of these requisites must be complied with if the instrument is to constitute a valid bill of exchange, for, as is pointed out by Story in his famous work on bills, "it would greatly perplex the commercial transactions of mankind, and diminish and narrow their credit and negotiability, if paper securities of this kind were issued out into the world encumbered with conditions, and if the persons to whom they were offered in negotiation were obliged to inquire when these uncertain events would be reduced to a certainty. And hence the general rule is that a bill of exchange always implies a personal general credit not limited or applicable to particular circumstances and events which cannot be known to the holder in the general course of its negotiation".

### A Bill must be an Order.

The Act does not prescribe any form of wording as essential to the validity of a bill, and provided that the words employed in ordering the payment are not a mere request but have an *imperative* character, any form of wording will satisfy the definition. "A bill must in its terms be imperative and not precative".<sup>1</sup> Thus an instrument running "Please let bearer have £100 and you will much oblige me" has been held not to be a valid bill.

### The Order must be Unconditional.

This most important provision requires that the order to the drawee must be free of any conditions subject to which payment is to be made. There may be a conditional acceptance [Section 19 (2a)] or a conditional indorsement (Section 33) of a bill, but the use of any words implying a conditional *order* from the drawer would invalidate the instrument as a bill.

It must be noted, however, that the employment of words which give a *direction* to the drawee coupled with the order do not necessarily affect the unconditional character of the order, provided that such a direction falls within the exceptions specified in Section 3 (3), which provides as follows :—

3. (3) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to re-imbure himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional.

Thus, instruments running, "Pay AB or order £100 out of the money in your possession belonging to the A. Company", or "Pay to Thomas Brown £700 out of the proceeds of the sale of cargo shipped per ss. *Majestic*", are invalid as being conditional orders to pay out of a particular fund. On the other hand, an order to pay a sum of money followed by the statement, "Which you will please charge to my account and credit according to a registered letter I have addressed to you", has been held to be an unconditional order, since it consists merely of an unqualified order to pay coupled with a indication of a particular account to be debited with the amount. For similar reasons, orders running, "Please pay to Messrs X & Co., or Order £600 on account of monies advanced by me for the A. B. Company", or "Please pay X.Y., or Order £120 against 20 chests of tea shipped by ss. *Majestic*", would be quite valid.

The test of the conditional character of the order is whether payment to the holder of a bill depends upon the fulfilment of any condition other than the mere pecuniary capacity of the acceptor to pay the bill when presented; if so, then the order is conditional.

<sup>1</sup> Chalmers, *Bills of Exchange*, 6th edn., page 12.

But although an instrument with a conditional form of order is void as a bill of exchange, it may nevertheless be used as evidence of a contract between the drawer and drawee, provided it is properly stamped.

### The Order must be in Writing.

Section 2 of the Act provides that "writing" includes "print". A typewritten bill or one in pencil would also be valid, but the risks of alteration, obliteration or defacement make such an instrument undesirable in commercial usage.

### "Addressed by one Person to another".

The term "person" is defined by Section 2 as including "a body of persons whether incorporated or not", so that the drawer or drawee may be one or more individuals, or they may be incorporated bodies or partnerships.

From the following provisions of Section 6 it will be seen that there may be more than one drawee to a bill, but if there are, they must be addressed *jointly* and not alternatively or in succession.

6. (1) The drawee must be named or otherwise indicated in a bill with reasonable certainty.

(2) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange.

Thus a document addressed to "Thomas Robinson *or* James Brown", or to "Thomas Robinson, and thereafter to James Brown", would not be a bill, although it would be quite in order if the drawees were addressed *jointly* thus, "To Thomas Robinson *and* James Brown".

This section provides also that the drawee must be named or otherwise indicated with reasonable certainty. Accordingly, if a person purports to accept an instrument in the form of a bill with no drawee mentioned, then that person cannot be made liable as acceptor of the bill since such an instrument is not a valid bill of exchange. But the person purporting to accept may be held liable on his signature as the maker of a promissory note.

In this connection, Section 5 (2) further provides:—

5. (2) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

Although this sub-section permits the drawer and drawee of a bill to be the same person, an apparent exception seems to arise in the case of bankers' drafts drawn by one branch on



another branch, or on the Head Office, of the same bank, for such drafts are not deemed to be cheques. (See Chapter 19.)

### The Bill must be Signed by the Person Giving the Order.

Although the signature of the drawer is essential to the validity of the bill, it need not be affixed when the bill is drawn. It may be affixed *at any time*, but until it is so affixed, the instrument is incomplete or inchoate, and is not valid as a bill or note.

Section 18 (1) expressly provides that acceptance may take place before the drawer signs the bill :—

18. A bill may be accepted—

- (1) Before it has been signed by the drawer, or while otherwise incomplete.

### A Sum Certain in Money.

All bills must be drawn for payment of money and money only. An instrument which by its terms requires some other act to be done in addition to the payment of money is an invalid bill, for by Section 3 (2) of the Act :—

3. (2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

Thus where a bill was drawn ordering “the payment of money and the delivery of a wharf and horses”, it was held that such an instrument was an invalid bill. But the custom of stating on the face of a bill that documents are to be given up either on acceptance or on payment (see Example 12, page 213) is apparently recognised, and does not make the instrument invalid.

For the purposes of the Act, the term “money” means legal tender currency of the realm (see *ante*, page 94), and accordingly it has been held that a promise to pay in “East India Bonds” does not comply with the provisions of the Act.

A bill is invalidated also by the addition of any words to the amount of the bill which would cause the sum payable to be other than *a sum certain*, i.e., such as would make the amount payable an indefinite or contingent sum. Thus a bill ordering payment of “£100 and all fines according to rule” was held to be an invalid bill. But by Section 9 :—

9. (1) The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—

- (a) With interest.
- (b) By stated instalments.
- (c) By stated instalments, with a provision that upon default in

(d) According to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill.

(3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

*Interest under this sub-section does not mean interest as damages on dishonour.*

It will be noted that in the case of payment by instalments, the Section requires the instalments to be *stated*. But it will be a sufficient compliance with the provisions if the amount of each instalment is either specifically stated, or is clearly ascertainable from the wording of the bill by reason of the fact that it gives a sufficient indication of the number of instalments payable and the date of payment of each instalment. Accordingly, a bill for “£200 payable by two equal instalments due 1st March and 1st September” is a valid bill, but one for “£200 payable by instalments” is not valid, for in the latter case no indication is given as to the amount of the instalments.

It is important to note that a discrepancy between the amount payable in words and figures on a bill will not invalidate the instrument, for by virtue of Section 9 (2) :—

9. (2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

### Payment must be On Demand or at a Fixed or Determinable Future Time.

Payment “on demand” is thus defined by Section 10 :—

10. (1) A bill is payable on demand—

(a) Which is expressed to be payable on demand, or at sight, or on presentation; or

(b) In which no time for payment is expressed.

(2) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

*Refer to Sections 14, 36 (3), 45 (2), 60 and 73.*

The ordinary form of cheque is a bill on demand in which no time for payment is expressed, for the order usually runs : “Pay James Brown or order, ten pounds”.

A *fixed* time is not defined by the Act, but is considered to apply when a bill is drawn “On 7th September 19.., *fixed*, pay.....”, or “On 7th September, 19.., *without grace*, pay.....” in which case no days of grace will be allowed. (See below.)

On the other hand, a *determinable future time* is explicitly defined by Section 11 of the Act in the following terms :—

11. A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable—

(1) At a fixed period after date or sight.

- (2) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

(Sections 14 (2), (3), 18 (3), and 65 (5) indicate how the due date is determined.)

The period of time for which a bill has to run before maturity does not affect the validity of the bill, so long as the day upon which payment is to be made is definite and certain to occur. Thus if payment is dependent on the occurrence of an event which is *certain* to happen even though the actual date of its happening is unknown, then the bill is valid. Accordingly, an order to pay "Seven days after the death of A", is a good bill, but orders to pay "On the marriage of A" or "On the birth of a son to X" or "On the arrival of H.M. ship 'Connaught' at Calcutta" are not valid, for there is no certainty that any of these events will occur.

### Payment must be to Order or to Bearer.

If a bill is not payable to bearer, Section 7 (1) provides:—

7. (1) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

This certainty as to the payee must be obvious from the face of the bill itself, but in cases of "latent ambiguity"—as, for instance, when the payee is misnamed or designated merely by description—oral or written evidence will be allowed to identify the payee. Thus if a bill is made payable "to the order of Jim Broune", evidence would be admissible to prove that "James Brown" is the person intended to receive the money, or the payee may write the *wrong* name and sign his proper signature underneath. (See *post*, Chapter 13.) The certainty of persons in this respect is not affected by the fact that there may be one or more payees, for Section 7 (2) allows payment to be made to joint, alternative or one of several payees:—

7. (2) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.

Examples of bills payable to the holder of an office for the time being would be instruments running: "Pay to the Order of the Chancellor of the Exchequer", or "Pay the Town Clerk, Bedford, or Order".

By Section 5 (1) of the Act it is provided:—

5. (1) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee.

A bill in which the drawer and payee are the same person would run "Pay Self or Order" or "Pay Ourselves or Order".

The case is not so easily understood where the acceptor and payee are the same person. Such bills are drawn when the drawee acts in two distinct capacities, as, for example, where he is trading on his own account and where he is also agent for another party interested in the bill. The negotiation of such an instrument is essential to the establishment of any rights under it, as "The instrument is not a bill *which can be enforced* until the drawee has indorsed it away".<sup>1</sup>

An example of such a bill would be one drawn "Pay to your Own Order", as might arise for instance where the drawee is an agent of a party to whom the drawer is indebted, while the agent himself is indebted to the drawer. Thus, the A. Co., Ltd., owes £100 for rent to a landlord C. B (the property agent of C) has bought articles to the value of £100 from the Company. The Company therefore draws a bill on B "Pay to your own order £100", and B indorses the bill to C after acceptance by himself.

Section 8 provides that "a negotiable bill may be payable either *to order* or *to bearer*", and proceeds to define a bill payable to order in the following terms:—

8. (4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

(5) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

Thus an order bill may be drawn payable in any of the following forms:—

(1) "To A or Order"; (2) "To the Order of A"; (3) "To A".

In each of these cases the effect is the same, and the bill is a negotiable instrument in the hands of A, who has power to transfer or negotiate it by indorsement followed by delivery, if he so desires.

As a general rule, a bill payable to order or to bearer is a fully negotiable instrument, but by its terms transfer may be definitely prohibited, and in regard to this Section 8 (1) of the Act provides:—

8. (1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

The prohibitive words must in themselves clearly indicate an intention to restrict the transferability of the instrument, for the law will not imply such an intention if any ambiguous words are used. The most usual method of prohibiting transfer is by drawing the bill in the form "Pay A *only*" without the words "or order" or "or bearer" or with such words clearly crossed

<sup>1</sup>Chalmers, *op. cit.*, page 18.

out and initialled by the drawer. The word "only" is regarded as clearly indicating the drawer's intention to restrict transfer and to order payment to be made to the named payee and to no one else. In the case of a cheque, the words "Not transferable" are usually added across the face of the instrument.

### Bills Payable to Bearer.

The term "bearer" is defined by Section 2 as "the person in possession of a bill or note which is payable to bearer".

Section 8 (3) defines a bill payable to bearer in the following terms :—

8. (3) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.

An indorsement in blank, as explained in Chapter 13, is one which specifies no indorsee, i.e., where the payee or indorser merely signs his own name and does not make the bill payable to another person.

Section 7 (3) provides that two further classes of bills may be regarded as payable to bearer :—

7. (3) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.

Considerable litigation has arisen over the interpretation of these terms *fictitious or non-existing persons*, and important consequences have resulted from the decisions of the Courts.

Prima facie, the term *fictitious payee* refers to some purely imaginary individual as in Specimen 5 on page 201, but it is possible for the payee to be fictitious in spite of the fact that a living person bears the name inserted, for it has been held that, where the drawer does not *intend* payment to be made to a person bearing the name inserted, the payee is deemed to be fictitious however many existing persons bear that name.

Thus, if A, wishing to make a bill payable to a fictitious person, inserted as payee the name "Ebenezer Leadbeater", without intending payment to be made to an individual with that name, the bill would be a bearer bill, nor would its nature be in any way affected by the appearance of a person named Ebenezer Leadbeater.

Thus in *Vagliano Bros. v. Bank of England*, 1891, the plaintiffs had accepted bills of exchange payable at the bank purporting to be drawn by A payable to the order of B & Co., both A and B & Co. being customers of the plaintiffs. Subsequently it was discovered that the plaintiffs' clerk had forged the names and signatures of both A and B & Co. to the bills, and, by indorsing the bills in the name of B & Co., had obtained cash for the bills from the Bank. The plaintiffs claimed that the Bank had made payment upon a forged indorsement, and were therefore not entitled to debit the plaintiffs' account with the amount of the

bills (see Chapter 14). The bankers, however, pleaded that the bills were rightly regarded as bearer bills within the meaning of Section 7 (3) of the Act, and that they were accordingly protected against the forged indorsement. It was held by the Court that the payees, although in fact actual persons, were nevertheless "fictitious" within the meaning of the Act, as the drawer, i.e. the clerk, did not intend payment to be made to the person named, and that the bills, being properly regarded as payable to bearer, could be debited to the account of the plaintiffs. A similar principle where a bill was payable to a *non-existent* person was involved in *Clutton v. Attenborough*, 1897. (See *post*, page 253.)

In both these cases, the contention that the indorsement of the payee was a forgery failed, as it is patently impossible to forge the signature of a fictitious or non-existent person. Hence the validity of the bill and the title of the holder were unaffected, it being held in each case that the instruments were payable to bearer, and therefore that a good title could pass to the holder (including the paying banker) by mere delivery without indorsement.

On the other hand, in *North and South Wales Bank v. Macbeth*, 1908, A was induced by a fraudulent misrepresentation of a statement of fact made by B to sign a cheque in favour of C. When A signed he *intended* the named payee C to receive the proceeds of the cheque. B forged the indorsement of C and obtained payment of the cheque from the collecting bankers, who were not protected by Section 82. It was held that the drawer could obtain repayment from the bankers, since the payee was not a fictitious person within the meaning of Section 7 (3) of the Act, and therefore the cheque was not payable to bearer. Consequently, the bankers were held liable as having paid on a forged indorsement.

In this case, and also in the case of *Vinden v. Hughes* (see *post*, page 253), the payees were not "fictitious" persons since the drawer in each case when designating the payee intended the person named to receive payment of the bill. Accordingly, a valid indorsement of the payee was necessary to the proper negotiation of the bill, and the forgery of the indorsement rendered void the title of the holder.

### Inland and Foreign Bills.

The specimen bills on pages 199-201 were referred to as being "inland bills". Inland and foreign bills are thus distinguished by Section 4 of the Act:—

4. (1) An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein Any other bill is a foreign bill.

For the purposes of this Act "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

The definition of "British Islands", as given in this Section, is more comprehensive than the term "United Kingdom" used by the Stamp Act, 1891, in reference to the determination of stamp duties (see Chapter 26). Moreover, it should be noted that the definition of "British Islands" here given still remains unaltered by the legislation of 1922 which conferred special status on Northern Ireland and the Irish Free State.

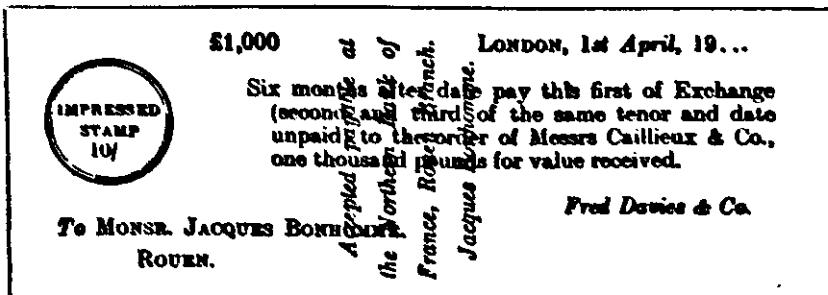
From a consideration of the foregoing definition of an inland bill, it follows that a bill is a *foreign bill* if

- (a) It is not drawn within the British Islands, or
- (b) If drawn within the British Islands, it is neither payable therein nor drawn upon someone resident therein.

### Foreign and Inland Bills Compared.

The majority of inland bills conform to the simple specimens given at the beginning of this chapter, but greater variation is found in the case of foreign bills. Apart from the fact that foreign bills are frequently drawn in foreign currencies, they usually also contain an indication of the particular funds against which they are drawn, or they specify how the rate of exchange is to be determined, or provide that documents attached, representing the goods against which the bill is drawn, are to be surrendered on acceptance or on payment (see Chapter 19). The following specimens<sup>1</sup> will serve to illustrate the points referred to in this and the preceding paragraph :—

#### 7. Ordinary Form of Foreign Bill




For the purposes of the Bills of Exchange Act this is an example of a foreign bill, for although it is drawn in the British

<sup>1</sup> See *The Principles and Arithmetic of Foreign Exchange*, by the same author. (Macdonald & Evans, London).

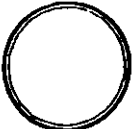
Islands, it is *not payable therein nor is the drawee resident therein*. As, however, the instrument is drawn in the United Kingdom, it must be treated as an inland bill for stamping purposes, and must therefore be drawn on impressed stamp paper. If the drawee had accepted this bill payable at a bank in London or at an address or office of his own in this country, the bill would be an inland bill for both purposes, as it would be drawn *and payable* in the British Islands.

### 8. Inland Bill Payable Abroad

	£200	at	LONDON, 1st April, 19...
	Six months	of the	date
	order,	the sum of	two hundred pounds, for value received.
To WILLIAM BROWN & Co.,	63 ST. JAMES STREET,	LONDON.	Fred Davies & Co.

This is an example of an *inland* bill, for although it is payable abroad, it is drawn in the British Islands on a person resident therein. Moreover, the bill would be none the less an inland bill even if the payees, Brown & Co., reside abroad and indorse or negotiate the instrument outside the British Islands, for the place of indorsement or negotiation does not affect the character of a bill as inland or foreign.

### 9. Foreign Bill: Commercial.

No. 735 Fcs. 7205.50	GIBRALTAR, 10th May, 19...
	Fourteen days after date, pay this bill of exchange to our order, the sum of seven thousand two hundred and five francs, fifty centimes, value received, which place to account as per advice.
	A. BUTLER.
To MESSRS ALBERT FRÈRES, LYONS.	

Where on the face of the bill it is uncertain or it cannot be definitely ascertained whether it is an inland or foreign bill, Section 4 (2) of the Act will apply, enabling the holder to treat the instrument as an inland bill. Apart from the question of stamp duty, which is dealt with fully in Chapter 26, one of the chief practical results of the difference between inland and foreign



### 10. Demand Bill Payable by Instalments

£250

LONDON, 17th September, 19...

On demand pay to me or my order the sum of two hundred and fifty pounds for value received, by five equal monthly instalments on the 1st of each month, the first instalment being payable on the 1st October, 19.., and upon default in the payment of any instalment the whole balance then unpaid shall forthwith become due and payable.

To THOMAS ROBINSON,  
17 EAST STREET,  
NORTH BANK.

JAMES BROWN

### 11. Foreign Bill, Payable Exchange as per Indorsement

£965-0-0

LIVERPOOL, 27th May, 19...



Ninety days after sight of this First of Exchange (Second and Third of same tenor and date unpaid), pay to myself or order the sum of nine hundred and sixty-five pounds for value received, exchange as per indorsement, and place to account as per advice.

ALBERT ROBERTS.

To MESSRS MARK, BRUCE AND CO.,  
RIO DE JANEIRO.

### 12. Foreign Bill, with Interest Clause

Exchange for £1,000

LONDON, 30th June, 19...



Ninety days after sight, pay this First of Exchange (Second and Third of the same tenor and date unpaid) to the order of Lloyds Bank, Ltd, London, the sum of one thousand pounds sterling, payable at the National Bank of India's drawing rate for sight drafts on London on the date of payment, with interest from the date hereof to the approximate due date of the arrival of the remittance in London, value received. Documents to be surrendered against acceptance.

To MESSRS ROYD AND RICHARDS,  
CALCUTTA.

P.P. A. MARKS, LTD.  
I. BROWN,  
Director.

In need with A. Richards and Co., for honour of drawers.

bills is that upon dishonour by non-acceptance or non-payment a foreign bill *must* be noted and protested, whereas in the case of an inland bill noting and protesting are *optional*, except in certain special circumstances (see *post*, Chapter 17). Moreover, inland bills are generally *solo* bills, i.e., only one *part* exists, whereas foreign bills are usually drawn in "sets" of two or three parts. (Refer to "Bills in a Set" below.)

### The Holder of a Bill.

The term "*holder*" of a bill is defined by Section 2, quoted above, as "the payee or indorsee of a bill or note who is in possession of it or the bearer thereof". By virtue of this definition the holder of a bill may or may not be the person who is legally entitled to the instrument, while the person in possession of a bill may or may not be the holder. For example, if A the payee of a bill indorses the instrument in blank and gives it to a banker X for collection, then X and not A is the holder of the bill, for he is the bearer thereof, i.e., "a person in possession of a bill which by its terms is payable to bearer". On the other hand, if a person other than the payee of an unindorsed bill payable to order is in possession of it, he is not the holder of the instrument. Thus the drawee of a bill payable to the order of a third party which has been sent to him for acceptance is not a holder, for he is neither the payee nor the indorsee of the instrument.

Again, a person who finds a bill payable to someone else's *order* is not the holder, for he cannot obtain a proper title to the instrument unless it is signed by the payee, while if the payee's indorsement is forged, any person who is in possession of the bill by virtue of that forgery is not a holder in any sense of the word; he is merely a wrongful possessor, and may be sued for the conversion of property belonging to another. On the other hand, the finder of a bill payable to *bearer* or *indorsed in blank* who keeps the bill, or a person who steals such a bill, is a holder of the instrument, although he is an unlawful holder; that is, his possession of the instrument is unlawful, but by reason of the fact that the bill is payable to bearer he can nevertheless give a valid discharge to anyone who pays it in good faith, and he can also transfer a good title to anyone who takes the bill before maturity in good faith and for value. It must be reiterated that a person taking a bill under a forgery, or the thief of an unindorsed bill payable to the *order* of another, is not a holder of the instrument; the only possible holder of a bill on which a material signature is forged is the true owner of it when, if ever, it returns into his hands, i.e., the person whose signature was forged in order to make the bill appear to be in proper order.

### Holder in Due Course.

It will thus be clear that the title of a mere holder may possibly be proved defective, and that he may be unable to sue on the instrument in his own name. In contradistinction to such a holder is a *holder in due course*, who has an unassailable title to the instrument in practically all circumstances. A holder in due course is one who has taken the bill under the conditions defined in Sub-section 29 (1) of the Act, as follows :—

29. (1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions ; namely,
- (a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact :
  - (b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

It will be noted that there are four requisites to complete the title of a holder in due course : (a) the bill must be complete and regular on the face of it ; (b) it must be taken before it is overdue, without notice that it had previously been dishonoured ; (c) it must be received in good faith and for value, and (d) it must be taken without notice of any defect in the title of the person who negotiated it. Thus a person cannot be a holder in due course if he has knowledge of any fraud or illegality in connection with the bill on the part of the person from whom he received it. Notice of defect of title for this purpose means actual, though not formal notice, that is, either a knowledge of the facts, or a suspicion that something is wrong combined with a wilful disregard of the means of confirming such suspicion.

It must be noted again that a person cannot be a holder in due course if his title to the instrument depends on a prior forgery, for, as already stated, a person whose title depends on a forged signature is not a holder in any sense of the term. It is a case of absolute want of title and not mere defect of title. Moreover, a person cannot be a holder in due course of a bill which is *absolutely void* for any reason, as, for example, a bill which is void under Section 30 of the Act (see Chapter 16), or a bill which is *absolutely void* under Section 5 of the Betting and Loans (Infants) Act, 1892 (see page 109). With these exceptions, a holder in due course has an absolute title to the bill against all the world. He can take action on the bill in his own name against any or all of the prior parties thereto, and he can do so free of all defences which are based upon defective title, and free of any mere personal defences available to prior parties among themselves. Thus it is no defence to his claims that a bill was stolen or lost provided that he does not claim through a forgery. Moreover, by virtue of Sub-section 29 (3) a holder in due course can transfer an equally good title to any person to

whom he chooses to pass the instrument, whether he transfers it for value or not.

29. (3) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

It may be noted in connection with this sub-section that even if a person taking from a holder in due course has *knowledge* of a fraud or illegality affecting the bill, he still takes all the rights of that holder provided that, as the sub-section enacts, he is not a *party* to the fraud or illegality.

### Holder for Value.

A Holder for Value is the holder of a bill *for which value has at any time been given*. He may or may not have himself given value for the bill, or he may have received it from a person who has or has not himself given value, nevertheless he has all the rights of the person from whom he received it against all prior parties to the bill. But if he did not himself give value, he has no rights against the person from whom he received it. Moreover, although a holder who has not obtained the bill in due course may sue on it in his own name, he is liable to be defeated by any defects in the title of his predecessors, for such a holder, however honest, can acquire no better title than the person from whom he received the bill. On the other hand, he can indorse the instrument to a holder in due course, and give the latter a good and complete title.

The meaning of defective title is defined as follows in Sub-section 29 (2) of the Act :—

29. (2) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

“ Force and fear ” is the Scottish term for “ duress ”.

Thus a holder for value who is not a holder in due course, will be unable to sue on the bill if the signature of the drawer was obtained by fraud or force, or if the bill was stolen from the party sued, or, of course, if the bill bears a forged signature. But although a holder for value is unprotected as regards defects which arose *subsequent* to the giving of value, his position is much stronger as regards defects which arose *before* the giving of value, for by Sub-section 30 (2) “. . . if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, . . . or illegality ” the title of the holder will be presumed to be good if he “ proves that, subsequent to the alleged fraud or illegality,

value has in good faith been given for the bill". As a matter of fact, if the holder could prove that full value had been given, there would be an almost conclusive presumption that it had been given in good faith.

Finally, it must be remembered that although a holder for value is not necessarily a holder in due course, a holder in due course is both a holder for value and a holder. The term "holder in due course" was, in fact, substituted in the Act for the former more cumbersome term "*bona fide* holder for value without notice". Again, a person who is a holder for value is always a holder, while a person who is a holder *may* be shown to be both a holder for value and a holder in due course. It is all a question of the legal position of the person concerned and of the facts of his case.

### Parties to a Bill.

A person becomes a party to a bill of exchange only when he *signs* it and delivers it with the intention of assuming liability thereon, either as drawer, acceptor or indorser. Accordingly, the drawee of a bill does not become a party until he accepts the instrument, while the mere fact that a person's name is mentioned on the face of the bill as a "referee in case of need" or as a "case of need" (see Chapter 17), does not render that person liable as a party to the instrument. But such a person will, of course, become liable as a party if he signs his name to the instrument as an acceptor for honour.

### The Drawer.

The drawer is the person who addresses the order to the other person, and his signature is essential to the validity of the bill. Thus, if A draws a bill on B, but does not put his signature to it, and B accepts the bill which is then transferred for value to C, no action can be brought against any of the parties to the instrument until A adds his signature, for until this is done the instrument is invalid as a bill or note.

Moreover, no person is liable as drawer of a bill until he has affixed his signature thereto and has *delivered* the instrument for the purposes of negotiation, for by Section 21 it is provided that :—

21. (1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

We have already seen by Section 5 (1) (*ante*, page 208) that the drawer of a bill may also be the payee, and that by Section 5 (2) (*ante*, page 204) the drawer may be the same person as

the drawee. There may also be more than one drawer to a bill, or the drawer may consist of a group of individuals or of a corporation sole or aggregate.

### The Drawee or Acceptor.

The person to whom a bill is addressed is the *drawee*, but he does not become a *party* to the bill and is not liable thereon *unless and until* he signifies his undertaking to be liable by writing his signature across the face of the bill, either with or without the word "accepted" and the date. By such act the drawee is said to have accepted the drawer's order, and he is thenceforward known as the "acceptor".

Although Section 6 (1) (*ante*, page 204) requires a drawee to be named or indicated on the bill, yet, even if the bill is not accepted by the drawee, it is nevertheless a valid bill in the hands of any party provided that it is valid in all other respects, and any person who signs the instrument is liable in respect of his signature to any subsequent party or holder.

Again, in the case of the acceptor, as in the case of the drawer, his signature on the instrument must be coupled with delivery of the bill by him in order to complete his liability, and until delivery has been effected the drawee may withdraw his acceptance. Thus, in one case a bill was left with the drawee for the purpose of acceptance and after acceptance was mislaid by him before it had been redelivered to the holder. In the meanwhile the drawer became bankrupt, and on hearing this the acceptor cancelled his acceptance upon finding the bill, which he thereafter surrendered to the holder. It was held that he was not liable on the bill, as he had the right to revoke his acceptance since the bill had not been delivered by him. But where a drawee has in fact duly written his acceptance on a bill and still retains it in his possession, he may render his acceptance *irrevocable* by giving notice to or according to the directions of the person entitled to the bill that he has accepted it. This is an exception, expressly made by Section 21 (1), to the necessity for delivery in the case of contracts on bills.

It has already been observed (*ante*, page 204), that there may be joint drawees to a bill but not drawees in the alternative or in succession. Moreover, the drawee may be the same person as the drawer, or he may be a fictitious person or a person having no contractual capacity, but in such cases the instrument may be treated as a bill or a promissory note at the option of the holder.

### The Payee.

The payee does not become a *party* to the bill and undertake liability thereon until he has "indorsed" it, i.e., written his name on the back of the bill and completed his liability by delivery. After indorsing the bill the payee is known as an

*indorser*, and it will be observed that by Section 2 the payee in possession of a bill is also called a "holder". As the first delivery of a bill to the original payee is not "negotiation" within the meaning of the Act, the payee of a bill cannot be a holder in due course (*R. E. Jones v. Waring & Gillow*, 1926).

Unlike the case of the drawee, there may be payees in the alternative, i.e., a bill may be drawn payable to "Thomas Robinson or James Brown".

### The Indorser.

An indorser is a person who, as a holder, has signed and delivered a bill. If the bill was originally or has become subsequently by indorsement payable to his order, his signature is affixed for the purpose of putting the bill into a proper state for negotiation. Section 2 of the Act defines indorsement as "an indorsement completed by delivery". Thus, in Example 1 on page 199, James Brown will become an indorser if he affixes his signature on the back of the bill before negotiating it to another party, known as the "*indorsee*", who will in turn become another indorser if he signs his name before negotiating the instrument.

By Section 56 of the Act :—

56. Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

In such cases it is usual to say that the person "backs" the bill, and he is sometimes known as a *quasi indorser*. "An indorsement, properly so called, must be made by the holder; but when a person who is not the holder of a bill or note backs it with his signature he is not an indorser, but a *quasi indorser*".<sup>1</sup>

### Capacity of Parties to a Bill of Exchange.

The capacity and authority of parties to a bill are thus defined in Section 22 of the Act :—

22. (1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

As is pointed out in Chapter 7, capacity to contract is in general enjoyed by all persons, and it follows from the above Section that, subject to the limitations and restrictions which have previously been mentioned and which are discussed more fully below, the power to draw, accept or indorse bills of exchange

<sup>1</sup> Chalmers, *Bills of Exchange*, 8th edn., page 215.

is enjoyed by all persons. The word *persons* here includes all those *legal persona* previously noted who, although not persons in actual fact, are nevertheless persons in the eye of the law.

### Liability of Infants on Bills.

It has long been the rule of Common Law, now further strengthened by the Section above quoted, that an infant is not liable in any capacity on a bill of exchange. An infant cannot be sued on his signature to a bill, and this is so even though the bill was given in consideration of a transaction for which the infant could be sued, e.g., an infant cannot be sued on a bill given in consideration for necessaries supplied—*In re Soltykoff*, 1891. In such cases, the infant can be sued by the vendor for the *price* of the necessaries supplied, but no action can be brought on a bill given in payment of the price. The same rule applies even though, when giving the bill, the infant fraudulently represents himself to be of full age.

It is to be noted that the Act does *not* say that a bill signed by an infant is *void*, but only that *no action can be brought against the infant*. It follows, therefore, that the fact that an infant is one of the parties to the bill does not invalidate the instrument, and the Section specifically provides that the bill is perfectly good in the hands of the holder and entitles him to receive payment from or bring action against any other party to the bill.

The provisions of Sections 1 and 2 of the *Infants Relief Act*, 1874, are referred to on page 109, and from these it will be seen that if an infant gives a bill in consideration of any of the transactions made void by that Act, then not only is the infant free from any liability on the bill, but he cannot be sued on the consideration, i.e., the debt or obligation in respect of which the bill was given.

Again, a person cannot be made liable on a bill given during infancy which he has ratified on reaching full age. Thus, in the case *Ex parte Kibble*, 1875, an infant *three* months before attaining full age accepted a bill payable *six* months after date. On attaining his majority he ratified the transaction and the bill was negotiated. It was held that he was not liable on his acceptance.

But if during infancy a person contracts a debt (other than a loan of money—see below), which is void under Section 1 of the *Infants Relief Act*, 1874, as, for example, in respect of goods supplied other than necessaries, and, on reaching full age gives a negotiable instrument in payment thereof, he will be liable on the instrument to a holder in due course. Thus, in *Belfast Banking Company v. Doherty*, 1879, an infant after attaining his majority accepted a bill to pay a debt contracted before his majority. He was held liable to a holder in due course.

In any of the foregoing circumstances the bill itself is not



void, and the rights of the other parties to the bill as amongst themselves remain unaffected; it is only the infant who is not liable. But although an infant cannot himself be sued on a bill, there is nothing to prevent him suing on a bill negotiated to him, providing he sues by his guardian or "next friend", i.e., a person who can properly represent him.

Moreover, if he acts under authority and signs in a proper form, an infant may add his signature to a bill as an agent for a named principal and the bill will be valid for all purposes to give rights to the principal and to render him liable to subsequent parties; but the infant himself cannot become liable by so signing.

It must, however, be clearly understood that Section 5 of the *Betting and Loans (Infants) Act, 1892*, makes *void absolutely* as against all persons whomsoever, any negotiable instrument, including a bill of exchange, given by a person after attaining full age for the repayment of a *loan* of money advanced during that person's infancy (see *ante*, page 109). Thus B after attaining his majority, accepts a bill drawn by A, to pay a *loan* of money advanced by A to him (B) during infancy. The bill is indorsed to C, but as the bill is entirely void, C cannot bring any action on the bill against either B or A, even if he (C) is a holder in due course.

### The Capacity of Corporations in Respect to Bills.

There are three considerations to be noted in deciding whether a corporation is liable on a bill of exchange, viz., capacity, form and the authority of the persons acting on behalf of the corporation. "In order to determine whether a company or other corporation is liable on a bill, three questions must be asked: (1) Has the company the requisite capacity to bind itself by bill? (2) Is the signature on the bill sufficient in form to bind the company? (3) Was the signature placed there by a person having authority to sign bills for the company?"<sup>1</sup>

A corporation has no capacity to contract by bill unless it is given such power by virtue of express provision in its Memorandum or regulating statute, or by implication from the nature and scope of its powers. "Without a special authority, express or implied, a corporation has no power to make, accept, draw or indorse bills or notes".<sup>2</sup> This is the general rule, but difficulty arises in those cases where no express power to contract by bill is granted in the Memorandum of a company, for it must then be considered whether such power can be implied. "Such authority will be implied in the case of a company incorporated for the purposes of trade, the very object of whose institution requires that it should exercise this privilege".<sup>3</sup>

<sup>1</sup> Chalmers, *Bills of Exchange*, 8th edn., page 225.

<sup>2</sup> *Byles on Bills*, page 84.      <sup>3</sup> *Ibid.*, page 84.

The simple rule appears to be that a *trading* company has implied power to contract by bill but a *non-trading* company has not, and it is a question of fact in each case whether a company belongs to one class or to the other. Thus it has been held that a waterworks company, a mining company, a salvage company and a gas company are corporations which have no implied power to contract by bill since they are non-trading companies, so that in such cases express power to contract by bill must be contained in the incorporating statute or in the Memorandum of the company if the corporation wishes to issue or sign bills in its own name.

It must be noted, however, that it seems to be an accepted principle of law that all companies have power to make payments of their liabilities by *cheque*, as distinct from bills, and to indorse cheques payable to them, for presumably the keeping of a banking account is regarded as being reasonably necessary in the case of all companies and corporations.

A corporation must enter into a contract in such a form as is necessary to bind a corporation of the specific class to which it belongs. In this connection, Section 91 of the Act provides that :—

91. (1) Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

(2) In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

The result is that a corporation may contract on a bill either under its seal or under its signature as written by its appointed agent or agents.

With reference to registered joint-stock companies under the *Companies (Consolidation) Act, 1908*, Section 97 (3) of the Bills of Exchange Act ensures that the provisions of the Companies Acts shall not be affected by any provisions in the Bills of Exchange Act. Accordingly, Sections 76 and 77 of the Companies (Consolidation) Act will apply to the signing of bills of exchange on behalf of a registered company. The former section enacts that companies may enter into contracts by deed, in writing or orally in the same manner as private persons, while Section 77, quoted on page 149, *ante*, provides that a company will be bound if its name is signed on a bill of exchange or promissory note by anyone *acting under its authority* and signing for or on behalf of, or on account of the company. (See also Chapter 15 on "Indorsements".)

The exemption of certain companies from liability on a bill by virtue of the doctrine of *ultra vires* has given rise to much difficulty and has been the subject of many important legal decisions.

In general, the position seems to be that, if the Articles of a company give power to contract by bill, and if bills are signed on its behalf by any person, who by virtue of that provision *may or can have* power to sign for the company, then the company is bound, since such person would be deemed to be a "person acting under its authority" within the provisions of Section 77 of Companies (Consolidation) Act, 1908, above mentioned. And this is so even if such person did not, in fact, have authority to sign, since by virtue of the *Rule in Turquand's Case*, 1856, outside parties are entitled to assume (unless they have actual knowledge to the contrary) that a person who, under a company's constitution *may* have authority to sign on the company's behalf, actually has such authority.

Thus, in *Dey v. Pullinger Engineering Co.*, 1920, a bill of exchange was drawn on behalf of a company by the managing director, one director, and the secretary, and was accepted by the secretary. These persons had in fact no authority to sign on behalf of the company, although under the Articles the managing director *might* have been authorised to draw and accept bills. The bill came into the hands of a holder in due course and was dishonoured. It was held that inasmuch as the managing director could have been authorised, under the Articles, to draw and accept bills, a holder was entitled to assume that he had authority, and accordingly such holder was not bound to inquire into the internal management of the company or to prove actual authority in reference to the particular bill. The company was therefore held to be bound and the holder in due course had a right of action against it upon dishonour of the instrument.

### How a Person becomes a Party to a Bill.

The Act of 1882 lays down two essentials before a person can become a party to a bill, viz., (1) *Signature*, and (2) *Delivery*. The question of "delivery" has already been mentioned, and is further discussed in Chapter 16, but in regard to signature, Section 23 of the Act provides :—

23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such : Provided that

- (1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name :
- (2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

The signature may be the usual signature of the party, or it may be made by mark (see *post*, page 249), or by the use of any instrument which is used for the purpose of attesting instruments, e.g., it may be made by rubber stamp, or by seal, as in the case of a corporation. An example of a trade or assumed name arises where a person named John Brown is in business trading

alone as The Acme Cycle Co., or some similar description, and signs bills in that name on behalf of the firm.

The Act does not require that the signature shall be affixed by the person to be made liable as a party to the bill, for by Section 91, quoted above, the signature may be affixed by some other person acting by or under authority of the person purporting to sign. (See below under "Agents".)

### Signature by a Partner.

The provisions of Sub-section 23 (2) above, have special reference to partnership businesses, such as are discussed in Chapter 8. It must be noted that the Act requires the name of the firm itself to be affixed; the mere name of a partner would not bind the firm, even though the partner has authority to sign on its behalf. The liability of a firm where the partner has no authority to execute bills on its behalf depends upon the nature of the particular partnership business. The general rule, as in the case of corporations, is that partners in a *trading* partnership have implied authority to bind the firm on a bill, whereas partners in a *non-trading* partnership, as, for example, a firm of doctors, solicitors or auctioneers, have no such authority.

Moreover, in the case of a *trading* partnership, if a partner who in fact has no authority to sign for the firm draws, endorses or accepts bills in the name of the firm, the firm will be bound by the signature to a holder, *unless* it can be proved that that holder knew of the absence of authority in the partner signing, while a holder in due course may sue the firm even though the bill has been wrongly given in consideration of a private debt of the partner signing. A partner in a non-trading firm, however, has no *prima facie* authority to bind the firm on a bill, so that his signing of a bill in the name of a firm will not bind his copartners unless they ratify his act or have in fact authorised the signature.

In this connection there is a distinct difference between a non-trading partnership and a non-trading corporation. Whereas the former may, if it so desires, ratify a bill signed by a partner on its behalf and so bind itself on the instrument, a non-trading *corporation* cannot ratify such an instrument signed on its behalf, since, if a non-trading corporation has no power to contract by bill, any such contract made in its name is *ultra vires* and void at law.

### Signature by an Agent.

The powers and duties of agents have been considered in detail in Chapter 7. When an agent is employed to sign bills on behalf of his principal, it is usual for the agent to do so by a *per procuration* signature. Thus where a company named N. Arnold

& Co., Ltd., gives its managing director, Thomas Robinson, authority to sign bills on its behalf, the usual form will be :—

*per pro.* (or p.p.) N. Arnold & Co., Ltd.,  
Thomas Robinson,  
Managing Director.

It is most important when dealing with bills signed in this way that the authority of the agent should be known to exist, for Section 25 of the Act provides that :—

25. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

This provision is of special importance in the case of bills signed "*per pro.*" on behalf of private individuals, for although the necessary authority may be implied in the case of trading partnerships and companies, there is no similar implication of authority in the case of private individuals. It is therefore essential in such cases that the authority to sign *per pro.* be expressed and that its value and limits be known to any party relying upon an instrument bearing such a signature, for the principal is not bound if the agent has no authority to sign on his behalf, and even where the authority exists the agent can only bind the principal to the actual extent of the delegated authority. For example, a clerk who has authority to draw cheques "*per pro.*" for purposes of his principal's business, draws a cheque "*per pro.*" his employer and makes it payable to a bookmaker in payment of his own betting losses. If the bookmaker cashes the cheque he can be made to refund the amount to the principal, for he should know that it would be most unusual for a clerk to be in a position to give his principal's cheques for such purposes. The important bearing of this section on cheques with *per pro.* signatures is considered in the following chapter.

As in the case of all contracts by agents, an agent who complies with the requirements of the Act will not be personally liable on a bill of exchange or promissory note even though his own signature appears on the instrument. In this respect Section 26 provides :—

26. (1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

From these provisions it will be observed that it is not sufficient for the agent merely to sign his own name and give the capacity in which he signs, e.g., "L. Jones, Agent for Thomas

Robinson", or "A. B. and C. D., Churchwardens", for in such cases the parties signing are personally liable. The signature employed must be of such a character as to indicate reasonably that the agent does not undertake personal liability, but acts as an agent for a *named* principal and shows his authority in a proper form. Reference should be here made to the cases quoted in Chapter 12 in illustration of this point.

Finally, by Section 31 (5) :—

31. (5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

Thus, D, the holder of a bill payable to his order, dies and his executor X negotiates the bill by means of an indorsement signed "J. X., executor of D". X is personally liable on the indorsement, unless he adds to his signature such words as "*sans recours*" or "without recourse to me personally".

Examples of other indorsements covered by this section are given in Chapter 13.

### Date of Bill.

The date of the bill is generally affixed by the drawer in the right-hand top corner, though it is provided by Section 3 (4) of the Act that the omission of the date does not invalidate the bill. Moreover, Section 13 (2) provides that a bill shall not be invalid merely because it is antedated or postdated, or that the date borne is a Sunday.

If the bill is undated it will be considered to be dated as at the time it was made, or rather, it is suggested, as of the time at which it was issued. The date appearing on a bill is *prima facie* the true date of the instrument, for by Section 13 (1) :—

13. (1) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.

Section 9 (3) provides for the case in which a bill expressed to be payable with interest is issued undated :—

9. (3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

By virtue of Section 14 (2) the date of a bill is regarded as *material*, and accordingly any alteration therein will render the bill void as against any parties who have not consented to the alteration. Nevertheless, Section 12 makes provision for the holder of certain bills to affix the date if the instruments are incomplete in this respect. Thus :—

12. Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

It is to be noted that in the case of the date of the bill itself, the Section applies to bills payable at a fixed period after *date*, but in the case of the date of *an acceptance*, it applies to bills payable at a fixed period after *sight*. Moreover, although the Section enacts that only the true date shall be inserted, the insertion of a wrong date by honest mistake will not invalidate the instrument.

### Days of Grace and the Due Date.

One of the principal functions of the date on the face of a bill is that it enables the holder or bearer to determine at a glance how long the instrument has been drawn and outstanding. But, in the case of bills payable at a determinable future time *after date*, its important purpose is to enable the holder or bearer to ascertain the date of maturity or payment of the instrument, so that presentment for payment on the due date may be made to the person who is to pay the bill.

A bill payable *on demand* is, of course, payable by the drawee at any time on or after the date of the instrument. A bill payable *after sight* is payable at the expiration of the determinable period from the time when the bill is first sighted by the drawee, while a bill payable *after date* falls due at the expiration of the determinable time from the date given on the instrument. But in the last two cases Section 14 provides in the following terms for the allowance of three extra days, known as "Days of grace", before the bill need be paid by the acceptor:—

14. Where a bill is not payable on demand the day on which it falls due is determined as follows:

- (1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that—
  - (a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day;
  - (b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a Bank Holiday, the bill is due and payable on the succeeding business day.
- (2) Where a bill is payable at a fixed period after *date*, after *sight*, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

- (3) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.
- (4) The term "month" in a bill means calendar month.

The days of grace provided for in this section do not apply to bills payable on demand such as cheques, which are payable on presentation to the drawee-banker, nor to bills drawn payable on a certain date "fixed" or on a certain date "without grace". By custom also Bank Post bills issued by the Bank of England are paid without grace (see Chapter 19). Where a bill is made payable by instalments days of grace may be added to the date of each instalment, e.g., if a bill for £100 is made payable by two equal instalments on May 1st, and June 1st, the instalments fall due to be paid by the drawee on May 4th and June 4th respectively. Days of grace are also allowed in the case of bills which are drawn payable only one, two or three days after date or after sight, in spite of the fact that such bills are liable only to the twopenny stamp duty as bills payable either on demand or at not more than three days after date or sight.

Sub-sections 14 (1a) and 14 (1b) aim at providing for cases in which bills fall due on *non-business* days, i.e., bank holidays, common law holidays and holidays appointed as such by Royal proclamation.

*Common law holidays* are those which have resulted from very ancient custom, and which are now legally recognised. They include Sunday throughout the British Isles, and Christmas Day and Good Friday in England and Ireland.

*Bank holidays* are those appointed by the Bank Holidays Acts, 1871 and 1903. In England, the bank holidays are Easter Monday, Whit Monday, the first Monday in August and Boxing Day, i.e., the 26th December if that date is a week-day, otherwise the 27th December if 26th December falls on a Sunday. The bank holidays in *Ireland* are similar, with the addition of St Patrick's Day, 17th March, if this day is a week-day or 18th March if the 17th falls on a Sunday. In *Scotland*, the bank holidays are New Year's Day (or if this day falls on a Sunday, the following day), the first Monday in May, the first Monday in August, Christmas Day and Good Friday.

It should be carefully noted that Christmas Day and Good Friday are bank holidays in Scotland although Common Law holidays in England and Ireland. Some books are in error in stating that these two days are now common law holidays in Scotland, for the law in reference to bank holidays has not been altered since the original Act of 1871. The fact is that Section 14 of the Bills of Exchange Act was drafted with the object of making uniform the laws of England and Scotland relative to holidays so that the effect on the due date of bills would be the same in both countries, i.e., it aimed at making Christmas Day



and Good Friday have the effect of common law holidays in Scotland as well as in England or Ireland. But those responsible for the Act overlooked the case where Christmas Day is a Saturday and the last day of grace of a bill falls on the following day, Sunday, 26th December. Since Christmas Day is a bank holiday in Scotland such a bill in Scotland would be payable on the succeeding business day, i.e., Monday, 27th December, for by virtue of Sub-section 14 (1b) "when the last day of grace is a Sunday and the second day of grace is a Bank Holiday, the bill is due and payable on the *succeeding* business day". But as Christmas Day is merely a common law holiday in England and Ireland, such a bill in those countries would be payable on the preceding business day, i.e., Friday, 24th December.

It will be noted that the section provides that the term "month" frequently used in bills after sight or after date means a *calendar* month and not a *lunar* month of four weeks. Accordingly, a bill dated 30th June at one month after date falls due on 2nd August. (30th July is one month from 30th June; to this add three days of grace, making 2nd August.)

Moreover, if a bill is payable so many *months* after date or sight, no account must be taken of "*lacking*" days in any month, so that a bill dated 31st December at two months after date falls due on 3rd March of the following year, and this due date would be unaffected whether or not the year was a leap year, i.e., whether the month of February contained 28 or 29 days. But a bill dated 1st February at 30 *days* after date is payable on the 6th March in an ordinary year and 5th March in a leap year, for in such a case *days* and not *months* must be reckoned.

A bill cannot be dishonoured by non-payment before the last day of grace, and presentment for payment before that date is premature.

Sometimes, in the case of bills payable *after sight*, the date of acceptance may not coincide with the sighting date, but the due date is nevertheless calculated from the sighting date. Thus if a bill payable one month after sight is accepted "Sighted 1st May, accepted 2nd May", the period begins to run from 1st May, not from 2nd May, and the bill falls due on the 4th June. Again, by Section 65 of the Act, in the case of bills payable after sight which are accepted for honour, the maturity of such bills is calculated from the date of noting for non-acceptance, and not from the date of acceptance for honour. The purpose of the law in all these cases is to put the holder in exactly the same position as he would have been in if the bills had been duly accepted on presentation.

Foreign bills are sometimes drawn payable at one or more *usances*, although the practice is now practically obsolete. "Usance" is the time for payment as fixed by custom between two countries, e.g., if the usance between London and Antwerp is one month, then a bill drawn in Antwerp dated 1st July and

payable in London at "Double usance", falls due on 4th September. In cases where usance is a month, then "Half usance" is fifteen days irrespective of the number of days in the month. Again, a bill drawn payable at the "middle of September" or the "middle of February", is deemed to fall due on the 18th of the month, irrespective of the number of days in the month, this date being computed by adding three days of grace from the 15th. Finally, a bill drawn "On the 17th September next, pay . . .", is payable on the 20th, but if it is drawn "On the 17th September *fixed*, pay . . .", or "On the 17th September, without grace, pay . . .", it must be paid on the 17th.

In most foreign countries days of grace are not allowed, but where bills are drawn in such foreign countries and made payable in this country, the usual three days of grace are allowed before payment is due. For in such cases "where a bill is drawn in one country and payable in another the due date thereof is determined according to the law of the place where it is payable". (Section 72.)

Thus a bill after date drawn in Paris payable in London takes three days of grace, whereas a bill drawn in London payable in Paris is payable without grace.

Until May, 1923, certain countries such as Russia and Greece, where the Greek Church is the prevailing religion, used the Old Style calendar, which is thirteen days behind the Gregorian calendar in use in Britain and the majority of other countries. As a result, the due date of bills had to be adjusted as between two countries using the different calendars, but this is no longer necessary since the date referred to, and the Gregorian calendar has now been adopted in all important countries.

### Examples Involving Days of Grace, etc.

DATE OF BILL.	CURRENCY OR TERM.	DATE DUE.
31st January.	One month after date.	3rd March in any year.
1st February.	One month after date.	4th March in any year.
1st February.	Thirty days after date.	6th March in an ordinary year. 5th March in leap year.
26th November.	Three months after date.	1st March in an ordinary year. 29th February in leap year.
1st May.	Three months after sight, sighted and accepted 12th June.	15th September.
1st May.	Three months after sight, sighted 12th June, accepted 13th June.	15th September.
22nd November.	One month.	24th December, unless that day is a Sunday, when it is payable on the 23rd.
23rd November.	One month.	If 26th is a week-day, due date is 27th in England and Ireland, but 26th in Scotland. If 26th is a Sunday, due date is 24th December in England and Ireland, but 27th December in Scotland.
24th November.	One month.	27th December, but if the 26th is a Sunday, the 27th becomes a bank holiday in England, in which case the bill is payable on the 28th.

### Due Date of Bills on Demand.

The due date of bills payable on demand is not fixed by any definite rules, but Section 45 (2) provides for the date of presentment for payment of such bills in the following terms :—

45. (2) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

What is a reasonable time in the case of cheques is discussed in Chapter 12. It may be added that the " term " or " currency " of a bill payable other than at sight or on demand is the period of time for which it has to run before it reaches maturity, i.e., the term during which the instrument is current. Such a bill is sometimes described as a *tenor* bill, and once the due date is reached it is no longer regarded as being current, but is described as being *overdue*.

### The Consideration for a Bill.

The obligations arising out of a bill are contractual in character since the bill itself is a simple contract. Thus, with certain statutory limitations, a bill must conform with the Common Law requirement that it must be given in respect of some *consideration*, which has been defined as " some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given suffered or undertaken by the other ". (*Currie v. Misa*, 1875.) In other words, consideration is a return or *quid pro quo* given by one person in respect of a promise made by another, with the result that the promise is not made *gratuitously*. As a rule, consideration takes the form of a transfer of goods or the performance of some service in return for payment, which may, of course, be made in legal tender or by cheque or bill of exchange, or in some other way. Like any other simple contract, a bill requires the existence of consideration in order that it may be legally enforceable against all parties, for the absence of consideration as between a transferor and transferee is a good defence by the transferor against action on the bill by the transferee.

It is a well-recognised principle of Common Law that valuable consideration must not be *past*. This means that, as a general rule, the consideration must pass between the parties *at the time when* the contract is made, and thus an *antedecent* debt or liability will not be valuable consideration for a subsequent agreement based on this past debt or liability. In respect of bills of exchange and promissory notes, however, the Bills of

Exchange Act overrides this principle of the Common Law, for by Section 27 of the Act it is provided :—

27. (1) Valuable consideration for a bill may be constituted by—

- (a) Any consideration sufficient to support a simple contract ;
- (b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

But although consideration is always *presumed* to exist in the case of a bill or cheque, there is no need to include a statement thereof in the bill itself, for by virtue of Section 3 (4) :—

3. (4) A bill is not invalid by reason—

- (b) That it does not specify the value given, or that any value has been given therefor.

The use of the words “ for value received ”, which are usually inserted in a bill, are however *prima facie* but not conclusive evidence of consideration having been given in respect of the instrument.

In any action on a bill there is a legal presumption, which may be rebutted (see “ Accommodation Bills ” below), that the defendant has received consideration. This is provided for as follows by Section 30 (1) :—

30. (1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

Thus any party to a bill, even if he became a party thereto for no consideration, is liable, as soon as value has been given by any *subsequent* party, to any holder who takes the bill after value has once been given therefor, and this is so whether that holder himself gave value or received the bill *gratuitously*. In such actions it is not necessary for the plaintiff to prove that consideration passed from him to the defendant, provided that the defendant became a party before consideration had passed on the bill. For example, B draws a bill on A who accepts for no consideration. B indorses the bill to C for value, who indorses it to D for no consideration. D, the holder, although a gratuitous holder, can sue A or B, even if he knows that A is a gratuitous party. D cannot, however, sue C, since C did not become a party to the bill *prior to the passing of consideration*.

The principle of law in such cases is thus expressed by Section 27 (2) of the Act :—

27. (2) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

Thus, if a holder for value indorses a bill to an agent for collection, the agent can sue the acceptor but he cannot sue his own principal. Chalmers<sup>1</sup> has expressed the principle as follows : “ The holder of a bill who receives it from a holder for value,

<sup>1</sup> *Bills of Exchange*, 8th edn., page 99.

but does not himself give value for it, has all the rights of a holder for value against all parties to the bill except the person from whom he received it”.

If the consideration which passes between *immediate* parties to a bill is illegal or void (i.e., unenforceable at law), the transferee cannot succeed in an action against his transferor, for in either case the consideration which passes would at law be regarded as no consideration at all. But there is a distinction between illegal and void consideration in so far as concerns the rights of a subsequent holder for value.

If the consideration for a bill is *illegal* by virtue of the Common Law or Statute Law, then a subsequent holder for value will not be able to bring an action on the bill, unless he is also a holder in due course. Thus in *Woolf v. Hamilton*, 1898, A gave B a cheque in payment of bets lost on horse-races (i.e., an illegal consideration). B indorsed the cheque to C, who knew the circumstances. It was held that C had no action on the cheque against A, as the consideration was illegal by virtue of the *Gaming Act*, 1835. The decision would have been otherwise had C been a holder in due course.

Where, however, consideration for a bill is *void*, then any subsequent holder for value may sue on the bill, for the subsequent passing of consideration cures the previous absence of consideration. Thus in *Lilley v. Rankin*, 1886, A gave a cheque to B in payment of gaming transactions on the Stock Exchange. B indorsed the cheque to C, who took the instrument with knowledge of the circumstances, but nevertheless gave value for it. It was held that C could sue on the cheque, as the earlier consideration was merely void and not illegal by virtue of the provisions of the *Gaming Act*, 1845.

Finally, the provisions of Section 27 (3) in regard to a holder who has a lien on a bill must be noted :—

27. (3) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

In the absence of special agreement to the contrary, a banker has a lien in respect of his advances on all negotiable instruments of his customers, including bills and promissory notes, which come into his hands in the ordinary course of business as a banker.

The operation of this section is illustrated by the following case. A, who holds a bill for £200, indorses it to B as a security for £100. B can sue A on the bill for £100 only, for he is a holder for value only to the extent of his lien.

### Accommodation Parties and Accommodation Bills.

An accommodation party to a bill of exchange is a person who has signed the instrument without having received any consideration for his having assumed the liability evidenced by

his signature on the instrument. The definition and liability of such a party is thus given by Section 28 of the Act :—

28. (1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

(2) An accommodation party is liable on the bill to a holder for value ; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

Where there are more than one *consecutive* accommodation parties to the bill, neither can sue the other on the bill, but any accommodation party who is called upon to pay a holder for value may sue the party accommodated, since the latter party is regarded as having agreed either (a) himself to take up the bill, or (b) within a reasonable time before maturity to provide the accommodating party with funds to meet the liability, or (c) to indemnify the accommodating party against the consequence of non-payment.

It is to be noted that the fact that one (or more) of the parties to a bill is an accommodation party does not necessarily make the bill an *accommodation bill*. This point is expressed in the following terms by Sir Mackenzie Chalmers : " A bill which is signed by one or more accommodation parties is frequently spoken of as ' an accommodation bill ' , but this is incorrect ; an accommodation bill is a bill whereof the *acceptor* (i.e., the principal debtor according to the terms of the instrument) is in substance a mere surety for some other person who may or may not be a party thereto. This distinction is material when questions arise as to what is a discharge of the bill. An accommodation bill is discharged by the person who is in substance, though not in form, the principal debtor (see Section 59 (3) ), or if time be given to such person ".<sup>1</sup>

From a legal point of view, therefore, an accommodation bill is one accepted by the drawee for the accommodation of another person, i.e., one whereon the acceptor is a mere surety and not the principal debtor. This other person may be the drawer, or an indorser, or a person whose name does not appear on the bill, but who uses the instrument in order to obtain credit by its sale, discount or negotiation. Moreover, as Byles points out, the mere fact that a bill has been accepted by an acceptor who has not received value does not make a bill an accommodation bill in the legal sense, *unless it is expressly accepted to accommodate* the drawer or an indorser, i.e., in order that the party accommodated may raise money on it or otherwise make use of it.

Thus a bill which has been signed by the drawer in order to accommodate an indorser, or which has been " backed " by a person who signs it as an indorser, is not an accommodation bill in the strict sense of the term, for in such a case the acceptor is the principal debtor and not a surety. Payment of a bill of this

<sup>1</sup> Chalmers, *Bills of Exchange*, page 102.

kind by the person accommodated does not discharge the instrument, for the acceptor remains liable until *he* pays. On the other hand, payment of a *pure* accommodation bill by the party who has been accommodated by the acceptor will operate as a total discharge of the instrument by virtue of Sub-section 59 (3) of the Act. Herein lies the vital difference between a pure accommodation bill and a bill which bears the signature of an accommodation party other than the acceptor.

It may, however, be added that bills of the second class above mentioned are frequently described as, or considered to be, accommodation bills from a *commercial* as distinct from a legal standpoint.

### Forged or Unauthorised Signatures.

It has already been noted that by Section 91 of the Act the signature on a bill need not be that of the party to be charged, provided that his signature is put on by some person by or under his authority. If, however, the person signing has in fact no authority to sign for the person whose name is given, then such a signature is ineffective to bind that person; for by Section 24 of the Act it is provided that:—

24. Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.

For the provisions of the Act to which the above section is subject reference should be made to Sections 54 (2) and 55 (2) as to *estoppel*, i.e., the conditions in which a person is precluded from denying the validity of his signature on a bill (see Chapter 12); to Sections 60 and 80 (see Chapter 14), which give protection to paying bankers in relation to forged indorsements on cheques, and to Section 82 (see Chapter 15), which protects the collecting banker in relation to forged indorsements on crossed cheques.

A person may be estopped from pleading the forgery, if, upon hearing of the forgery, he did not immediately disclaim it, or if by his conduct he has induced another party seeking to hold him liable to act upon the signature as if it was a genuine one. Thus, in *Brook v. Hook*, 1871, B's acceptance to a bill was forged. A holder who took the bill in good faith subsequently heard of the forgery, and wrote to B to inquire. B replied that the signature was his, and was accordingly held liable on the acceptance even though it was forged. (See also Chapter 12 in relation to forged signatures on cheques.)

It must be noticed that signature in the name of a *fictitious* or *non-existing* payee to a bill does not invalidate the instrument, for not only is it impossible to forge the signature of a person who does not exist, but also the bill is properly regarded as being payable to bearer by virtue of Section 7 (3).

Moreover, where a bill has been negotiated abroad by means of a forged signature, in a country where a forgery does not prevent the passing of a good title, then a holder in due course in this country would have a good title to the bill and could sue upon it.

### Material Alterations.

As in the case of any other simple contract, a material alteration in the terms of a bill without the consent of all the parties will invalidate the bill as against any party who has not consented to the alteration. In this connection the Act itself does not give a general definition of "Material alteration", but Sir Mackenzie Chalmers<sup>1</sup> defines such an alteration as one "which in any way alters the operation of the bill and the liabilities of the parties whether the change be prejudicial or beneficial".

Section 64 of the Act provides that:—

64. (1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised or assented to the alteration, and subsequent indorsers.

(2) In particular the following alterations are material, namely any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

The following are further examples of alterations which have been held to be material: (a) the alteration of the rate of interest specified in a bill, as from 3 per cent. to 2½ per cent.; (b) the alteration of the words "with lawful interest" to "with interest at 6 per cent."; (c) the conversion of a bill payable three months after date to a bill payable three months after sight; (d) a particular rate of exchange is indorsed on a bill which does not provide on the face of it that this shall be done; (e) a place of payment is added without the acceptor's consent, or (f) the place of payment is altered without such consent.

Since the bill is in itself a contract it is only just that a person, who in good faith and for value takes an instrument which on the face of it appears to be in order, should be enabled to enforce payment thereof, according to its original tenor, against any party thereto.

Such a right is afforded to a holder in due course by the following proviso to Section 64 (1):—

Provided that:—

Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course,

<sup>1</sup> Chalmers, *Bills of Exchange*, page 249.



such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.

In the case of *Scholfield v. Earl of Londesborough*, 1896, a bill was drawn for £500 with a stamp sufficient to cover £4000 and with vacant spaces before the amount in both the words and figures. After the acceptor had signed his acceptance he handed the bill to the drawer, who fraudulently altered the amounts in words and figures to £3500. It was held that a holder in due course could recover from the acceptor only the £500, the amount for which the bill was originally drawn; i.e., the bill was not avoided by the alteration but was payable according to its original tenor.

The following examples further illustrate the operation of this section of the Act. X, the holder of a bill, alters the amount payable and indorses it to Y, who indorses it to Z. Y and Z are aware of the alteration. Z can claim against X and Y, but he has no right of action against any party on the bill prior to X.

On the other hand, if in this example Z was a *holder in due course*, i.e., if he had given value in good faith for the bill, and was unaware of the alteration, then Z could sue X and Y for the full amount of the bill as altered, and he would have a right of action against any party prior to the indorsement of X, according to the "original tenor" of the bill, i.e., for the amount of the bill before it was altered.

### Inchoate Instruments.

An "inchoate" bill is one that is unfinished or incomplete in some particular. In connection with the completion of such instruments, Section 20 provides that:—

20. (1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit.

(2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

Reference should be made to Section 12 as to the omission of the date. The following points also require to be noticed. It will be observed in the first place that the section provides that the instrument must not only be signed, but that it must also

be *delivered*, such delivery being made *for the purpose of converting the instrument into a bill*. Thus if an inchoate instrument is stolen and the signature of one of the parties is forged, the fact that there has been no delivery would prevent any action being taken on the bill even by a holder in due course. Again, if an inchoate instrument has been delivered for safe custody only, but the person to whom it was delivered negotiated the bill by forging the signature of one of the parties, then no action will lie as the bill was not delivered for the purpose of conversion into a bill.

Secondly, unless there has been a limitation on his authority, the holder can complete the bill to the extent which the stamp will cover, but if the amount exceeds that which is covered by the stamp, then no action can be taken on the instrument, since an incompletely stamped bill is invalid and unenforceable. (*Stamp Act, 1891*—see Chapter 26.)

In the third place, if the delivery for completion is subject to any limitation as to the authority of the holder to complete the instrument, then, in order to make liable any party who became a party prior to completion, it is necessary to show that the limitations have been satisfied and that the bill was completed in accordance with the authority given. However, when the instrument has been delivered for purposes of completion and negotiation and, after being completed, later gets into the hands of a holder in due course, he has an *absolute* title and can sue on the bill even though the authority for completion has been fraudulently exceeded, or even though the bill was not completed within a reasonable time. But in all cases the title of a holder in due course will be defeated if the person whom it is sought to charge proves that there was no *delivery* of a signed instrument by him *for the purpose of completion*.

The fraudulent *completion* of an inchoate or unfinished bill must be carefully distinguished from the fraudulent *material* alteration of an instrument which is already completed, such as is dealt with under the previous heading. In the case of fraudulent completion a holder in due course, as already stated, has a right to enforce the instrument as completed against any party who took it subsequent to the completion and also against the original signer unless the latter can prove no delivery (Section 20). On the other hand, in the case of fraudulent alteration the holder in due course can enforce payment of the bill only *according to its original tenor*, i.e., according to its tenor before it was fraudulently altered (Section 64). This distinction is brought out in the following case, which should be compared with *Scholfield v. Earl of Londesborough* quoted in the preceding section.

In *Garrard v. Lewis, 1882*, A signed an acceptance, the amount being left in blank, but the figures £14, 0s. 6d. being given in the margin. The drawer fraudulently filled up the bill for £164, 0s. 6d.,

and altered the figures to make them correspond. It was held that a holder in due course could recover £164, 0s. 6d. from A. The alteration of the figures in the margin was held *not* to constitute a material alteration of the bill, but that the circumstances involved fraudulent *completion*, so a holder in due course was entitled under Section 20 to recover the full amount of the instrument as completed, and A could not plead material alteration of the instrument under Section 64.

Similarly, in *London Joint-Stock Bank v. Macmillan*, 1918, a partner in a firm drew a cheque incomplete as to the amount in words but inserted "£2 : 0 : 0" in the space for figures. A clerk misappropriated the cheque and completed the amount in words for "one hundred and twenty pounds", altering the £2 to £120. The bank which paid this cheque was able to debit the firm's account with £120.

Again, in *Smith v. Prosser*, 1907, the defendant, who was about to leave South Africa for England, handed to his agent two blank forms of promissory notes bearing his signature. The agent was ordered to keep the notes until instructions were sent by the signer from England authorising the agent to fill them up as promissory notes and to raise money on them in order to make certain payments in South Africa on the signer's behalf. The agent, without receiving such instructions, filled up the notes and discounted them with the plaintiff, who *bona fide* gave value for them, and the agent misappropriated the funds. It was held that the defendant was not liable on the notes, as he entrusted blank signed forms of promissory notes to his agent *as a custodian only*, and not with the intention that he should fill them up and raise money upon them without further instructions. The signer was therefore not estopped from denying that he was liable on the instruments.

In *Baxendale v. Bennett*, 1878, the acceptor was also able to prove no delivery. In that case a blank acceptance of B was stolen from his desk and completed as a bill. A subsequent holder in due course sued B upon the bill, but it was held that B was not liable thereon as there had been no *delivery* of the instrument for the purposes of its conversion into a complete bill.

On the other hand, in *Carter v. White*, 1883, A, in payment of a debt, gave B a blank acceptance of a bill for the amount of the debt. A died and B then completed the bill inserting his name as drawer and payee. It was held that B *could prove* against the estate of A for the amount of the bill, as it was handed to him with the *express object that it should be duly completed*.

### Bills in a Set.

A bill is drawn in a set when it is drawn in two or three parts, each part being on a distinct and separate piece of paper and

being similar to the other part or parts in its tenor, excepting that each part is worded so that it makes reference to the other part or parts. If one of the parts of a bill in a set is so drawn that it omits to make any reference to the other two parts of the set, then a *bona fide* holder can treat it as a separate complete bill. It is usual to refer to each part according to the number, e.g., "First of Exchange", "Second of Exchange", and "Third of Exchange", these being the three parts in order of a bill in triplicate.


Foreign bills are usually drawn in sets in order to lessen the risk of loss in the case of transmission, whereas inland bills are rarely so drawn. The following is an example of a bill drawn in a set of three :—

### First of Exchange

61 ST JAMES ST., LONDON, 1st April, 1926.
<b>£200</b> Sixty days after sight pay this First of Exchange (Second and Third of the same date and tenor being unpaid) to the order of D. Nansen & Co., the sum of two hundred pounds for value received.
<b>FRED DAVIES.</b>
To MESSRS J. JANSEN & Co., NEW YORK.

The Second and Third parts are similar, but the Second reads "pay this Second of Exchange (*First and Third of the same date, etc.*) to," while the Third reads "pay this Third of Exchange (*First and Second of the same date, etc.*) to."

### Foreign Commercial Long Bill, one of a Set

<b>£970-0-0</b>	NEW YORK, 17th January, 19...
	Sixty days after sight of this First of Exchange (Second and Third of the same tenor and date unpaid), pay to the order of the First National Bank, New York, nine hundred and seventy pounds sterling for value received, and charge same to the account of 100 bales of cotton <i>per s.a. "Adriatic"</i> .
	<b>T. ANTHONY AND SON.</b>
To THE NORTHERN BANK, LTD., LONDON.	

## Bankers' Long Bill, being one of a Set.

No. 619

£360-10-0

DEUTSCHE BANK, BERLIN,

17th January, 19...



Ninety days after sight of this our First of Exchange (Second and Third of same tenor and date being unpaid), pay to the order of Messrs Jacobs and Company, the sum of three hundred and sixty pounds, ten shillings sterling, value received, which place to account of this Bank as advised.

OSWALD SCHMIDT, *Manager.*

To THE NORTHERN BANK, LTD.,  
LONDON.

All the *special* legal principles applicable to bills in sets are contained in Section 71 of the Act, which provides as follows:—

71. (1) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.

(2) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills.

(3) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

(4) The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

(5) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

(6) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment, or otherwise, the whole bill is discharged.

From these provisions it will be seen that although the various parts of a bill in a set together form only one bill, yet circumstances may arise when some or all of the parts will operate as complete bills, in which case rights and liabilities arise on such parts quite distinct from, and without any relation to, any other part or parts of the bill. Thus, if the holder of a complete set indorses two or even three of the parts to different persons he is liable on each part to any indorsers who come after him, but each subsequent indorser is only liable on the bill to which his signature is affixed.

It follows that the acceptor should accept only one part of the set (generally the first one presented), for if he accepts more than one he is liable on each acceptance as on a separate bill, since different parties may appear on different parts by reason of the negotiation of such parts to different persons. [Section 71 (4).]

From the acceptor's point of view it is also most important that payment should be made only on that part of the bill which he has accepted, for if he pays on another part without receiving delivery of the accepted part, any holder in due course of the accepted part has still a claim against him on that part. [Section 71 (5).]

With these exceptions, discharge of a bill in a set is effected, subject of course to compliance with the provisions of Section 71, by payment of one part only, or by discharge of the bill by any other ultimate mode recognised in Sections 59-64 of the Act. (See Chapter 17.)

Only one part of the set (usually the one accepted by the drawee) requires to be stamped, and the other two parts are exempt from such duty unless one or both of them is negotiated by a holder as a bill separate and distinct from the other parts. (See Chapter 26.)

### Lost Bills of Exchange.

The Bills of Exchange Act affords two remedies to a holder who has lost a bill. The first, by Section 69, applies before a bill is overdue; and the second, by Section 70, applies to any action on the bill.

*Holder's remedy before bill is overdue.* By virtue of Section 69 :—

69. Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

The Act does not indicate the nature of the security to be given to the drawer, so that it is presumed to be a matter of mutual agreement, but where the jurisdiction of the Court has been utilised to obtain a duplicate from the drawer, then the security provided must be satisfactory to the Court. It is to be noted that it is only the *drawer* who is thus compelled to issue a duplicate. No reference is made to the indorsers or to the acceptor, so that it would appear that the holder cannot claim execution of a new bill by the acceptor or by any indorsers on the lost instrument.

*Action on a Lost Bill.* Nevertheless, Section 70 provides that the remedies of the holder against the acceptor or indorsers shall not be prejudiced by reason of the loss of the instrument.

70. In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

It is usual for the plaintiff to deposit the indemnity with the Court before the action is brought, otherwise failure to do so would debar the plaintiff's right to claim costs.

The loss of a bill does not excuse presentment for payment or the giving of notice of dishonour, and Section 51 of the Act requires protest to be made on a copy of the bill if the original is lost or mislaid.

## CHAPTER 12

### CHEQUES DRAWN BY THE CUSTOMER

In an earlier chapter it was pointed out that a cheque is defined by Section 73 of the *Bills of Exchange Act, 1882*, as "a bill of exchange drawn on a banker, payable on demand". The same section proceeds to state :

Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

It will be clear from this statement that most of the law relating to bills which has been discussed in the preceding chapter will apply *mutatis mutandis* to cheques, and it is for this reason that the provisions referred to have been considered first in this book. In the following pages these provisions will be discussed primarily in their relation to cheques, and, in addition, those sections of the Act specially applicable to cheques will be considered in detail.

#### The Legal Definition of a Cheque.

As a cheque is stated by the Act to be a bill of exchange of a particular kind, a complete legal definition of the instrument can be obtained only by combining the definition given in the foregoing paragraph with the definition of a bill, given by Section 3 of the Act, which is discussed in Chapter 11. If this section is applied only to cheques it would read :

1. A cheque is an unconditional order in writing addressed by one person to another, who must be a banker, signed by the person giving it, requiring the banker to whom it is addressed to pay on demand a sum certain in money to, or to the order of, a specified person or to bearer.

2. An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of the money, is not a cheque.

3. An order to pay out of a particular fund is not unconditional within the meaning of this section ; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the banker is to reimburse himself, or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the cheque, is unconditional.

4. A cheque is not invalid by reason :—

(a) That it is not dated ; (b) That it does not specify the value given, or that any value has been given therefor ; (c) That it does not specify the place where it is drawn or the place where it is payable.



### The Requisites as to Form of a Cheque.

Every word in this section is of importance to a banker whose business consists so essentially in dealing with cheques drawn by his customers. Moreover, a cheque must conform strictly with the provisions of the definition if it is to be regarded as an instrument enforceable at law as a cheque, and if the banker and other parties thereto are to obtain that protection which they are afforded by the Bills of Exchange Act. Upon analysing the definition adapted from the Act, we find that there are seven essential requisites which must be fulfilled: (a) The order to pay must be *unconditional*; (b) the cheque must be *in writing*; (c) the order must be addressed *by one person* to another, who must be a banker; (d) it must be *signed* by the person giving it; (e) it must require payment *on demand*; (f) payment must be of a *sum certain* in money; (g) payment must be *to order or to bearer*. Each of these requisites is considered in detail in the following paragraphs.

### Parties to a Cheque.

To every cheque there are originally three parties: (a) *the drawer*, i.e., the person who addresses the order to the banker, and by whom or in whose name the instrument is signed; (b) *the drawee*, i.e., the banker to whom the order is addressed and who is authorised to pay the money; (c) *the payee*, i.e., the person to whom or to whose order the drawer wishes the money to be paid.

In the specimen given on page 97, *Thomas Robinson* is the drawer, *The Northern Bank* is the drawee, and *James Brown* is the payee. The liabilities of each of these parties are discussed in subsequent pages, but here it may be stated that as the provisions of the Bills of Exchange Act relative to bills apply generally to cheques, the rights and liabilities of the drawer, drawee, and indorser of a cheque are technically comparable with those of the drawer, drawee, and indorser of a bill payable upon demand, as considered in Chapter 11. As a fact, however, there are certain distinct differences.

In the first place, the drawer of a cheque is the party who is *ultimately* liable, for the drawee, i.e., the banker, is only called upon to pay out funds which are at the disposal of the drawer. The drawer of a cheque has no other person to look to if the instrument is unpaid and he is ultimately liable to the holder and any indorsers, whereas the drawer of a bill upon demand usually has a right of action against the drawee upon the consideration, or, if he has accepted, upon his acceptance. Furthermore, the holder of a bill upon demand which has been accepted by the drawee has an immediate right of recourse against the drawer in the event of dishonour, but there is no privity of contract or liability existing between the holder of a cheque and the

banker on whom it is drawn. The drawee-banker is only liable to his customer, and then only if the customer has funds at his disposal and the cheque has been wrongly dishonoured.

Again, a bill must be presented for payment *when it is due*, otherwise the drawer and indorsers will be discharged, and the acceptor also if he has stipulated for presentment in his acceptance; but the drawer of a cheque is not discharged for six years, unless he has suffered loss by the delay in making the presentment (see below).

### The Order to Pay must be Unconditional.

Firstly, the cheque must be an *unconditional* order to pay. This means that the drawer cannot impose any conditions upon the banker who is to pay the money, as, for example, by stating on the face of the instrument that it is to be paid only on condition that a receipt either on the front or on the back is duly dated, signed and stamped by the person receiving the money. But the drawer may if he so desires impose a condition on the *payee*, as for example, by insisting on the face of the cheque that an attached receipt is to be duly signed and stamped before *presentment* for payment. It is only the *order* to pay which must be unconditional within the meaning of the definition. Moreover, as is provided by Sub-section 3, a cheque will not be invalid merely because it bears on its face an indication of the account to be debited, e.g., "No. 1 Account" or "White Lion Account", or because it bears some indication of the transaction it is intended to settle, e.g., "Pay John Brown (Rent of 17 Northend Road) or order".

This provision is of special importance because customers sometimes issue documents requiring their bankers to pay money only on condition that an attached receipt is signed, but it is clear from the definition that such instruments are not cheques. (See Chapter 19.)

### The Cheque must be in Writing.

Secondly, the order must be *in writing*. From a practical point of view it is unfortunate that the Act does not explain what is intended to be meant by "writing", but it would appear from past legal decisions that the writing may be in ink, or lead-pencil, or that it may be printed, typewritten, or made by any other mechanical process.

Nevertheless, the use of an ordinary lead-pencil for completing cheques is generally discouraged by bankers, owing to the ease with which the writing may be altered or become indecipherable, and cheques so drawn are usually returned to the drawer for confirmation. Moreover, bankers will not pay cheques

upon which the signature of the drawer has been impressed by a rubber or metal stamp, for in such cases it is impossible to determine whether the signature has been placed on the cheque by the drawer himself or by his authority ; it is, therefore, usual to return cheques so drawn with the answer, "Signature by stamp requires drawer's confirmation". As a rule, however, cheques completed with a copying or indelible pencil are paid without question.

#### "Addressed by One Person to Another (a Banker)".

Thirdly, the order to pay must be addressed by one person to another, who must be a *banker*. *Person* in this sense means a legal *persona*, and, as provided by Section 2 of the Act, "includes a body of persons whether incorporated or not", i.e., it includes one or more individuals or a corporation sole or aggregate (see Chapter 9). But in all cases the drawer and the drawee must be *distinct* legal persons, and it is for this reason that a draft drawn by a banker on his head office is not strictly a cheque, for in the eyes of the law the head office and branch are regarded as one entity. (See Chapter 19.)

#### "Signed by the Person giving it".

The fourth requirement is that the cheque must be signed by the person giving it, i.e., by the drawer, who, although the definition does not so stipulate, must for obvious reasons be a customer of the bank on which the cheque is drawn. This requisite implies also that the signature may be written by the drawer himself or by any person acting under his authority, for as we have seen in discussing the law of agency, a person may appoint another to act for him in all such matters as the signing of cheques, and by so doing may render himself liable in just the same way as if he had himself signed the document. But it is imperative that an agent so signing should clearly indicate that he signs for a named principal in a representative capacity, otherwise he may himself be bound on the instrument. (See *ante*, page 225.)

The signature on a cheque need not be the actual name of the drawer, for it is provided by Section 23 of the Act :

23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such : Provided that :

- (1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name.
- (2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

Thus a customer trading as the Acme Cycle Company will be

bound on any cheques signed by him in that name, if he has arranged with his banker to draw cheques in that form. Furthermore, if three distinct persons are partners in a firm known as "The Acme Cycle Company", and the name is signed by one of them by arrangement with the banker, all three will be bound as if each had signed individually.

On the other hand, the customer cannot as a rule be held liable on a cheque if his signature has been forged or written thereon without his authority, for, in accordance with Section 24 of the Act, the effect of a forged signature so far as the drawer is concerned is as if the cheque has never been issued. Accordingly, his account cannot be charged with the amount, or, if it has been so charged, he is entitled to have the amount refunded. Furthermore, no one into whose hands the cheque has come can insist upon payment from the banker, although any holder can sue the person from whom he received the instrument if that person can be traced.

It will now be clear why it is of first importance that a banker opening a new account should obtain explicit instructions as to how cheques are to be drawn, and also that he should obtain and carefully register the specimen signatures of the person or persons who are to sign cheques upon the account. And when this has been done, a cheque should never be paid until the signature has been examined by a responsible official at the branch who is thoroughly acquainted with the handwriting and signatures of the various customers and with the arrangements made as to the signing of cheques on the respective accounts. In practice, bankers endeavour to safeguard themselves against forged or unauthorised signatures by ensuring that, in all except the smallest branches, cheques pass through the hands of at least three or four persons, including, usually, the paying cashier, the ledger keeper, the day-book clerk, and the accountant or chief clerk, who finally examines the cheques before they are sorted away.

Apart from the question of guarding against forgery or absence of authority, it is important also that cheques signed by impersonal drawers, such as limited companies, local authorities, clubs, and societies, should be signed strictly in accordance with the mandate given to the banker, and in such form that the company or body will be properly bound by the instrument. Thus, if cheques issued by a limited company are to bear the signatures of two directors and the secretary, they should not be paid unless all three signatures appear thereon and the signatures are genuinely what they purport to be.

In this connection it may be pointed out that there is no objection to a banker paying cheques of a customer without legal power to incur liability on such an instrument, as, for example, cheques of an infant or of a non-trading corporation having no power to bind itself by a bill of exchange. Such

cheques are, in fact, valid for all purposes if there is an adequate balance to meet them, but in the event of non-payment, a holder cannot proceed against the drawer although he can enforce payment against any other party or parties to the instrument, except, of course, the banker upon whom the cheques are drawn.

Cheques signed in foreign characters are perfectly valid if the signature is recognisable as that of the banker's customer, as also are cheques whereon the amount and other particulars are given in a foreign language, provided that it is clear what amount is intended to be paid.

**SIGNATURE BY MARK.**—Considerable care must be exercised, however, in dealing with cheques drawn by a customer who is so ill or illiterate as to be quite unable to write his name, or who, while able to write his signature, is unable to complete the body of the cheque or to recognise clearly what particulars are being filled in. In all such cases the banker should, in his own interests and in the interests of the customer, require the cheques to be completed and the money paid out by him *in the presence of a witness*. Thus an entirely illiterate person should be required to make his "mark" in the presence of the paying cashier, accountant, or manager, and of a reputable witness other than an official of the bank, the witness being required to verify the completion of the cheque and also the amount paid out by the bank.

If the customer is ill and unable to sign, or if able to sign cannot give a signature which the bank would accept, his mark should be witnessed by a doctor in attendance or by some person other than a bank official, the witness in this case also testifying that the details on the cheque are in accordance with the wishes of the customer. It is sometimes advisable also to obtain a medical certificate to the effect that, although the patient is unable properly to sign his name, he is nevertheless in full possession of his faculties and thus responsible for the issue of the cheque.

A signature by mark usually takes the following form, the signature, address, and occupation of the witness being added at the foot of the cheque :—

	John		WITNESS :	
His	X	Mark.	Henry Abbott,	Butcher.
	Brown		17 East Street,	
			Northtown.	

In no circumstances should the witness be the cashier or other bank official responsible for paying out the money, and if an outside witness is not available, the cashier for his own protection should arrange for two of his colleagues to witness the mark and the payment of the money.

Similar precautions are necessary in the case of a customer who is able to sign his name but is too ill or too illiterate to recognise the particulars in the body of the cheque. The author

has experience of customers of this kind who draw out considerable sums but have no idea how to complete a cheque or how to count the money handed to them. It is clearly to the advantage of the paying cashier in such cases to have a reliable witness of the transaction, who should be required to verify the amount paid. The same remarks apply in the case of a customer who demands cash for a cheque although he is so drunk as to be really irresponsible for his actions.

### The Order must require "Payment on Demand".

The fifth essential is that the order must require payment to be made *on demand*. In this connection Section 10 (1) of the Act provides that :

10. (1) A bill is payable on demand—
- (a) Which is expressed to be payable on demand or at sight or on presentation; or
  - (b) In which no time for payment is expressed.

In practice, cheques are usually drawn, "Pay Thomas Brown or order", no time for payment being expressed. It is doubtful whether an instrument which provides that presentment shall be made within a prescribed period or before a specified date, or which makes payment conditional upon the signing, etc., of a receipt, is payable on demand within the meaning of this section.

### "A Sum Certain in Money".

Sixthly, the order must require payment of *a sum certain in money*, and, as we have seen in regard to bills, the sum payable is a sum certain within the meaning of the Act, although it is required to be paid (a) with interest; (b) by stated instalments, with or without a provision that upon default in payment of any instalment the whole shall become due; (c) according to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the cheque.

As a rule, the amount of a cheque is stated both in words and in figures, but by the same Section it is further provided that where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by *words* is the amount payable.

In practice, cheques bearing the amount in words only are paid, but if the amount is given in figures only, it is usual to return the instrument marked, "Amount required in words". Such a cheque should not be paid on representment unless it bears clear evidence of having been properly completed by the *drawer*. If the amount given in words differs from that given in figures, the cheque should be returned marked, "Words and

figures differ", although bankers sometimes pay the amount in words if that is less than the amount given in figures.

Mistakes in specifying the amount to be paid are frequently made by customers in drawing cheques, but as a general rule payment should not be refused on this account if the obvious intention of the drawer is plain on the face of the instrument. Thus the mere omission of some or all of the words "pounds", "shillings" and "pence" is not sufficient to justify the return of a cheque if the amount can clearly be taken as agreeing with the amount in figures. For example, cheques reading "twenty-five 1/6d.", or "twenty-five one shilling and sixpence" may reasonably be paid if the amounts in figures are given as "£25, 1s. 6d."

The term "*money*" in the definition here discussed implies legal tender currency of the realm as defined in Chapter 6. Payment in any other form can be refused by the holder of the cheque, while to operate as a good discharge of the instrument a payment in legal tender must be for the exact amount of the cheque and must be made unconditionally. The holder cannot be called upon to give change, but his refusal to accept payment in legal tender does not discharge the debt, although it would render him liable to have to pay the costs of any action subsequently brought against the drawer to enforce payment.

The amount of cheques payable in the United Kingdom is sometimes expressed in a foreign currency, and it is then necessary to determine the sterling equivalent, both in order to pay the holder and to ascertain the amount to be debited to the drawer's account. In such cases the amount payable is converted into sterling at the rate of exchange for sight drafts in the relative currency prevailing at the place of payment on the day the cheque is paid. If, as sometimes happens, the payee objects to the amount in sterling which he is offered by the banker, it is usual to hand him in discharge of the cheque a demand draft in the foreign currency for the amount of the cheque, the cost thereof at the prevailing rate of exchange being debited to the drawer's account.

### **Payment must be to Order or to Bearer.**

Finally, a cheque must require payment to be made to, or to the order of, a specified person or to bearer. In this connection reference should be made to Section 7 of the Bills of Exchange Act, quoted on page 207. From this it will be seen that if the cheque is not payable to bearer and no payee is indicated, the banker is quite in order in returning the cheque marked "Payee's name required", although it is usual in practice to regard a cheque drawn "Pay.....or order" as being payable to the order of the drawer, and therefore requiring his endorsement as a dis-

charge. A cheque payable to bearer usually runs simply, "Pay .....bearer", or it may be drawn, "Pay Thomas Robinson or bearer". Open cheques so drawn may be safely paid to anyone presenting them for encashment and no indorsement is necessary. Sometimes the words "or order" usually printed on the face of the cheque are deleted, and the words "or bearer" substituted; but if such is the case the alteration should bear the initials of the drawer, otherwise the cheque should be returned marked, "Alteration requires drawer's initials".

A cheque is payable to two or more payees *jointly* when it runs, "Pay John Brown *and* Thomas Robinson", while the payees are alternative when payment is ordered to "John Brown or Thomas Robinson". An example of a cheque payable to the holder of an office for the time being would be one running, "Pay the Town Clerk, Bedford, or order", in which case it requires indorsement by the holder of that office for the time being.

### Fictitious or Non-existent Payees.

A fictitious or non-existent person, referred to by Section 7 (3), is not defined by the Act, but bankers frequently regard as coming under this provision cheques drawn payable to "Wages or order", "Cash or order", "National Health Insurance or order", etc. It would, however, be safer in all such cases to require the discharge of the drawer before the cheques are cashed, unless the banker is paying over the money to the drawer himself or to his authorised agent. A careful distinction must, however, be made between cheques of this kind which are clearly intended to be cashed by the drawer or his agent, and cheques which are made payable to impersonal payees such as "Water Rate or order", "Income Tax or order", "5% War Loan or order", "Rent of 40 High Street or order", and so on, in all of which cases it is obvious that the drawer intends the money to reach a specific destination, i.e., the recognised collectors of the rates or the person selling the stock or the person entitled to the rent. Accordingly, in such cases the paying banker should require a proper discharge by some person whom it is clearly intended shall receive the funds. Thus a cheque payable to "Water Rate" should be discharged by the local rate collector or by the treasurer of the local authority, that payable to "Income Tax" by the collector of taxes, and so on.

Sub-section 7 (3) applies also to cases in which actual names are inserted by the drawer as payees merely by way of pretence, and without any intention that persons bearing such names (if such persons exist) shall receive the money. In all cases of this kind the Courts have decided that the instruments may be taken as being payable to bearer, although it is not always clear until evidence has been heard that the payees were fictitious. Thus



in the case of *Clutton v. Attenborough*, 1897, where a clerk drew cheques on his firm payable to a fictitious person named Brett and appropriated the proceeds, it was held that as "Brett" was a non-existing person the cheques were payable to bearer, and accordingly that Attenborough & Sons, who had given value for the cheques in good faith, could hold the drawers liable. Another famous case concerning this point was that of *Vagliano Brothers v. Bank of England*, 1891, which, although it related to bills (see *ante*, page 209), resulted in a judgment which affects cheques also. In this case the names of *real* persons were inserted as payees in a number of bills by way of pretence only, and not with any intention on the part of the person who fraudulently drew the cheques that those persons should receive the money. It was held that the instruments were rightly regarded as being payable to bearer.

The general test appears to be, "Is the person named as payee intended to receive the money?" If not, the payee is fictitious and the instrument payable to bearer. This test was applied against the drawer in the case of *Vinden v. Hughes*, 1905, where a clerk in the course of his duties drew cheques for his employer to sign in favour of customers in payment of amounts which were not due, or in excess of amounts due. The employer signed the cheques *with the intention that the named payees should receive the money*. The clerk, however, forged the signatures of the payees and cashed the cheques with tradesmen, who acted honestly and obtained payment from the bankers. The drawer sued the tradesmen, who contended that the cheques were to be regarded as payable to bearer, so that the forged indorsements could be disregarded. It was held, however, that as the drawer clearly *intended* the named payees to receive the money, the payees were not fictitious and the cheques not payable to bearer. Accordingly, the tradesmen had to reimburse the drawer whose account had been debited.

Consequently, a drawer cannot claim that a cheque is payable to bearer merely because he has been grossly deceived as to the payee, for "it matters not how much the drawer of a cheque may have been deceived if he honestly intends that the cheque shall be paid to the person designated by him". (Mr Justice Bray in *Macbeth v. North and South Wales Bank*, 1908.)

A banker cannot, of course, be expected to know that the payee of a cheque drawn upon him is fictitious, and as a general rule it does not much concern him whether such is the case or not. On the other hand, the fact that the payee's name on a cheque is fictitious may save a banker from liability, as, for instance, where he has neglected to obtain a proper discharge for the payment; while it is clear that a holder who has taken such an instrument bearing a forged indorsement in good faith, will be enabled to enforce his rights upon it if he can show that the payee is fictitious and the cheque payable to bearer.

### The Stamp on a Cheque.

It will be noticed that the definition which we have quoted contains no reference to the fact that a cheque must bear a stamp, but by the *Stamp Act*, 1891, as amended by the *Finance Act*, 1918, all bills of exchange on demand, including cheques (other than those which are specifically exempted—see Chapter 26), must bear either an impressed or adhesive twopenny stamp. This matter is dealt with at length in Chapter 26, but here it may be stated that a cheque is not valid unless it is properly stamped, and, in the case of a cheque drawn *in this country*, the only persons who can effectively stamp the instrument are the drawer or the banker to whom it is presented for payment. No intermediate holder can effectually stamp an inland cheque when once it has been issued, and it is provided by Section 38 (1) of the *Stamp Act*, 1891, that every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped, shall be liable to a fine of £10 and shall not be entitled to recover upon the instrument.

### The Date of a Cheque.

The foregoing requirements as to the form of a cheque are all essential to its validity as a legally enforceable instrument, but this does not apply to the *date* of a cheque, for it is expressly provided by Section 3 (4a) of the Act that a bill (including a cheque) is not invalid because of the omission of the date. In practice, bankers are accustomed to return for completion cheques which do not bear a date, in spite of the fact that by virtue of Section 20 any person in lawful possession of a cheque which is wanting in any material particular, including presumably the banker to whom the cheque is presented for payment, has a *prima facie* authority to fill up an omission in any way he thinks fit, subject to any limitations of authority which he may have been given. The object of returning such instruments is to protect the paying banker, for although the drawer may have signed the cheque, he may not have wished that it should be issued and paid, and unless *delivery* can be proved against him, he is not liable on the instrument. (See Chapter 16.)

### Cheques which are "Stale" or "Out of Date".

Although a date is not essential to the validity of a cheque, the date of such an instrument is nevertheless of considerable importance to a holder in certain circumstances, for, by virtue of Section 36 (3) of the Act (see Chapter 16), a cheque becomes overdue for purposes of negotiation when it appears on the face

of it to have been in circulation *an unreasonable length of time*. As to what is an unreasonable length of time for this purpose is a question of fact to be determined by the circumstances of each case, but the effect of a cheque being negotiated after the lapse of a reasonable length of time is that the holder takes it *subject to any equities*, i.e., subject to any defects in the title of the person from whom he received the instrument. Moreover, an indorser of a cheque which is thus allowed to become "stale" before being presented for payment is freed from liability on his signature to the holder.

Sir John Paget<sup>1</sup> expresses the opinion that, in the absence of special circumstances, a cheque would be regarded as having been in circulation an unreasonable length of time from the point of view of its *negotiability* after the lapse of about ten days or so from its date of issue. This view was confirmed in a case decided at the Cardiff County Court, in which the plaintiff, a licensed victualler, gave £15 on account to a man named Brown for a cheque for £50 payable to Brown's order and dated *twelve* days previously. On presentation the cheque was dishonoured, and Brown, who had obtained it under false pretences, disappeared. The Judge held that the cheque was overdue when the plaintiff cashed it, and that it should have excited suspicion, as it had been in Brown's possession for thirteen days, although he told the plaintiff that he wanted money. The plaintiff could not, therefore, recover from the drawer by virtue of the defect existing at maturity of the cheque.

It is to be noted, however, that Section 13 (2) of the Act provides that a bill (including a cheque) is not invalid by reason only that it is *ante-dated* (i.e., dated prior to the date of the day on which it was issued) or *post-dated* (dated after the day on which it was issued), or that it bears date on a Sunday. Accordingly, the fact that a drawer dates a cheque several days before its issue will not affect its validity, although if the cheque was not immediately negotiated a holder would presumably be affected by prior defects of title, for there is ordinarily no means whereby he can determine that the date of issue was considerably later than the actual date of the cheque.

So far as a banker is concerned, the ante-dating of a cheque is of importance only in connection with the banking practice of regarding as "stale" for purpose of *payment* cheques which are not presented for some considerable time after their date. The custom of bankers in this respect varies considerably. Some bankers will return for the drawer's confirmation, and marked "stale" or "out of date", cheques which have been outstanding for more than six months, while others will pay cheques bearing a date twelve months prior to the date of presentation for payment.

<sup>1</sup> *Law of Banking*, 3rd edn., page 218.

## The Liability of Drawer and Indorsers on Stale Cheques.

From this explanation it will be clear that a cheque which is stale for purposes of negotiation is not necessarily stale from the point of view of payment by the banker. Moreover, it must be understood that the fact that a cheque is stale for either of these purposes does not necessarily imply that the *drawer* is freed from his liability to make the payment, or that an *indorser* of the cheque is discharged from liability in respect of his signature. The general rule of law in regard to bills on demand is thus stated by Sub-section 45 (2) :—

45. (2) Where the bill is payable on demand, then, *subject to the provisions of this Act*, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

An indorser would presumably be discharged under this section if the cheque was stale for purposes of negotiation. So far as the drawer of a *cheque* is concerned, however, this section is subject to the provisions of Section 74, which enacts as follows :—

74. Subject to the provisions of this Act—

[i.e., those of Section 46, relating to excuses for non-presentment]

(1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

(2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

In conjunction with this section it must be remembered that, as has been previously pointed out (see *ante*, page 166), the right of action on a simple contract debt, including a cheque or bill, is not barred for six years, which period begins to run in the case of a cheque from its date, or if no date is specified, from its date of issue, if that can be proved. It follows, therefore, that in spite of the fact that a banker will not pay a cheque which is over six or twelve months old, the holder may enforce payment thereof against the drawer at any time within six years of the date of the instrument, and will succeed, unless it can be shown to the satisfaction of the Court that, in accordance with Section 74, the *drawer has suffered damage by the delay* in demanding

ayment, or that the holder's title to the instrument is defective, that delay or omission in presenting for payment is not reasonably excused under Section 46 of the Act.

The Court would consider that the drawer had been pre-judged, and that the holder could not succeed against him, if the banker on whom the cheque was drawn had failed between the date of the cheque and the expiration of a reasonable time during which it should have been presented for payment. In such a case the holder would have to fall back on his right to prove in bankruptcy against the banker's estate, for if he were allowed to succeed against the drawer for the full amount, the latter would lose more by the delay in presenting the cheque than he would have done if it was properly presented and paid within a reasonable time of its issue. "Moreover, if the drawer had *no funds* to his credit, but was authorised to overdraw, the drawer would still be discharged; but the holder could not prove against the banker's estate".<sup>1</sup>

But it must be clearly understood that unless there is satisfactory *proof of damage*, the drawer of a cheque is *not* discharged merely because presentment was not made in a reasonable time, for Section 74 clearly states that *he must suffer actual damage* through the delay. It is in this respect that the position of a drawer differs essentially from that of an indorser, for by virtue of Section 45 (2) the latter is discharged by mere delay in presentment. Thus in the case of *King & Boyd v. Porter*, 1925, an auctioneer received a cheque for £150, dated 3rd May, 1921, from the defendant in payment for certain cattle sold by the auctioneer on behalf of the plaintiffs. The cheque was made payable to the auctioneer, but was handed by him *unendorsed* to the plaintiffs, by whom it was mislaid for a period of three years. In February 1924, it was discovered, and, after being endorsed by the auctioneer to the plaintiffs, was presented by them for payment on 11th March, 1924. The cheque was returned dishonoured on 14th March, notice of dishonour being given by the plaintiffs to the defendant on the following day. The Court of Appeal for Northern Ireland held that the effect of Section 74 of the Bills of Exchange Act, 1882, was to take cheques out of the operation of Section 45, and that, therefore, when there had been no actual damage suffered by the drawer through the delay in presentment, the drawer was not discharged by reason of the fact that the cheque had not been presented within a reasonable time.

### The Payment of Post-dated Cheques.

Although it is stated by the Bills of Exchange Act that a cheque is not to be regarded as invalid by reason of its being post-dated, considerable care must nevertheless be exercised by

<sup>1</sup> Chalmers' *Bills of Exchange*, 8th edn., page 268.

a banker in regard to cheques which bear a date after that on which they are presented for payment. The position is in fact one which is fraught with much danger, and accordingly it is the general banking practice to return all cheques of this kind with the answer "Post-dated", with or without the addition of the words "will pay on drawer's confirmation".

The guiding principle in regard to a post-dated cheque is that it must not be paid or debited to the drawer's account until the date indicated thereon, for unless the drawer has made an obvious mistake, it is to be presumed that in issuing the cheque his intention was that it should not be paid until the arrival of the date written by him. It must be remembered that a customer is entitled to choose how and when he will pay out his own money, and he may have various reasons for post-dating a cheque. Thus he may wish to have an opportunity of paying in sufficient funds to meet the instrument, or, from the point of view of interest charged against him or allowed to him by the banker, he may wish to have the benefit of the funds in his account until the last moment.

It follows, therefore, that in paying a post-dated cheque before its date a banker is virtually disobeying his customer's mandate, and will consequently have to stand any loss which results from his action. Thus, if such a cheque was lost and was cashed before its date by the finder or by a thief, or if before its date the customer stops payment, the banker will have to restore the money to the account. Again, the banker may render himself liable to an action for damages for injuring his customer's credit, if, through having paid such a cheque against a customer's balance, he is compelled to dishonour cheques subsequently presented because the balance is insufficient. Finally, if the banker seeks to protect his customer by paying the cheque but not debiting his account until the due date, the customer may fail in the meantime and the banker be left with the cheque on his hands. So far as the banker is concerned, therefore, the only safe course in regard to such cheques is to return them at once with the answer already given.

If a cheque is dated on a *Sunday*, it should not be paid on the previous Saturday, as may be done in the case of a bill of exchange not payable on demand by virtue of Section 14 (a) (see page 227). The cheque cannot be paid until the following Monday, so that any such cheque presented on the Saturday should be returned marked "Post-dated", or it may be held over by the banker until the succeeding business day, *provided* due advice of the fact is given to the presenter.

The point is not of much practical importance, but it is sometimes stated that although a post-dated cheque is recognised by the Bills of Exchange Act as a valid instrument, it is to all intents and purposes not payable *upon demand*, but is strictly a bill of exchange payable at a determinable future time, and, therefore,

if it is dated more than three days after its issue, really subject to *ad valorem* stamp duty (see Chapter 26). It has even been suggested that the absence of such a stamp renders the drawer liable to a penalty under Section 5 of the *Stamp Act*, 1891, but this is a point which has not yet been decided, although it would appear that there are some grounds for such a decision if the practice of money-lenders in taking post-dated cheques from borrowers, instead of properly stamped bills of exchange, is recognised as an attempt to avoid payment of the proper stamp duty on a long-dated bill. Nevertheless, the fact that such a cheque was insufficiently stamped would not affect any right of action on the instrument, for such an action could not be commenced until the arrival of the due date, when the cheque would be correctly stamped with the twopenny duty.

The full negotiability of a post-dated cheque is, of course, protected by Section 13 of the Act already referred to, but it is possible that the indorser of such an instrument could avoid liability on the grounds that it was not presented and paid within a reasonable time of his indorsing, if his indorsement was made some time before the arrival of the ostensible date of the instrument. Finally, it may be noted that an authority or power to issue cheques may not necessarily extend to the issue of post-dated cheques, by reason of their having the effect of bills of exchange payable at a future date. Thus it has been decided that a principal of a firm of solicitors, as distinct from a firm of traders, has no implied authority to bind his co-partners by a post-dated cheque drawn in the name of the firm, because although he may have authority to issue cheques, he has no such authority as to a bill of exchange other than a cheque (*Forster v. Mackreth*, 1867).

### Crossed Cheques.

A crossed cheque is defined by Section 76 of the *Bills of Exchange Act*, 1882, in the following terms :—

76. (1) Where a cheque bears across its face an addition of—

- (a) The words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable"; or
- (b) Two parallel transverse lines simply, either with or without the words "not negotiable";

that addition constitutes a crossing, and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable", that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

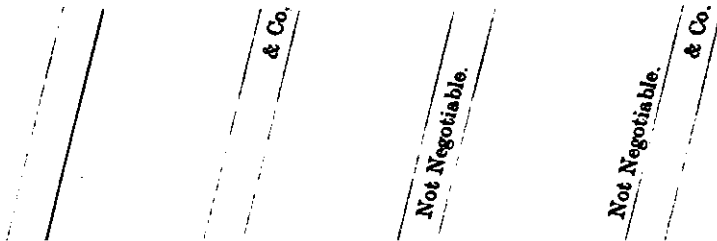
From this definition it will be seen that there are two distinct types of crossing : (a) *general*, and (b) *special*. A general crossing

must include two parallel transverse lines written that on perforated across the face of the cheque, and these in fact panied by any such additions as the words “ & Co. is the pany”, “Not negotiable”, “Not negotiable” and with “Account Payee”, “Account Thomas Robinson” of the . . . pounds”. In all these cases it is the *lines* of constitute the crossing, and although the additional what have a certain definite effect—discussed below—they are the essential part of the crossing, nor do they constitute a *cross* if the transverse lines are absent.

The name of a banker written, stamped, or perforated across the face of a cheque forms a *special* crossing, whether it appears alone or with transverse lines, or with any of the additional words which have been mentioned. In this connection it is interesting to note that the words “and company”, which so frequently form part of a general crossing, are a relic of the days when most bankers were private concerns operating under some such name as “Brown, Robinson and Company”, the last two words being inserted by the drawer with the intention that the remainder of the name of the banking firm would be filled in by the payee, with the object, as we shall see later, of protecting the drawer and the holder by making it impossible for a thief to encash such a cheque over the counter.

The following are specimens of the most frequently used forms of general and special crossings.

#### SPECIMENS OF GENERAL CROSSINGS





if it is dated r SPECIMENS OF SPECIAL CROSSINGS

to *ad valorem*  
 suggested th  
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 practice  
 borrow  
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Northern Bank, Ltd. Northtown.	Northern Bank, Ltd. Northtown.	Northern Bank, Ltd. Not Negotiable.
Northern Bank, Ltd. A/c Payee only.	Northern Bank, Ltd., Northtown. Remitted for collection to Lloyds Bank, Ltd.	Northern Bank, Ltd., Northtown. A/o Northtown U.D.C.

The Words "Not Negotiable".

Of the additional words which are frequently added to a crossing only the words "Not negotiable" are recognised by the Bills of Exchange Act as having any special effect, and in regard to these, Section 81 provides:—

81. Where a person takes a crossed cheque which bears on it the words "not negotiable", he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

In order to be operative the words must clearly form part of the crossing, and must therefore appear in close proximity to the two parallel lines or the name of a banker.

It must be distinctly understood that the effect of this section is in no way to restrict the *transfer* of a cheque from one person to another, but it has the effect of removing from a cheque that characteristic of negotiability to which we have previously referred (see *ante*, page 195), and by virtue of which any holder who takes the instrument in good faith and for value is enabled to sue in his own name free from any defects in the title of the person from whom he received the instrument. If therefore a person takes from a thief or finder a cheque crossed "Not negotiable" which has been stolen or lost, he cannot enforce payment of the instrument nor can he retain any moneys paid to him in

respect of the instrument as against the *true owner*, however honestly he may have acted, and even though he had no knowledge of the fact that the cheque had been stolen or lost. On the other hand, if there is no question of defective title, the instrument is good for all purposes, and may circulate in exactly the same way as a cheque which does not bear the restrictive words.

It must be thoroughly understood that the words "not negotiable" have no significance unless they form part of a crossing, and accordingly if they appear alone on the face of a cheque they do not have the effect of restricting its negotiability in the manner indicated. At the same time, a banker who is called upon to pay an *uncrossed* cheque bearing these words would be well advised to safeguard the interests of himself and of his customer by returning the instrument as an embarrassing document requiring the drawer's confirmation.

### The Object and Effect of Crossing a Cheque.

It is sometimes thought that an ordinary general or special crossing on the face of a cheque impairs its full negotiability, but this is not the case, and unless the words "Not negotiable" appear, a general or special crossing has no effect whatsoever upon the full negotiability of a cheque as between different holders. As Sir John Paget points out<sup>1</sup> "the whole purview and scope of the crossed cheques sections of the Bills of Exchange Act are for and against bankers and bankers only, affording through them a safer method of drawing cheques for the public."

The way in which a crossing thus operates for and against a banker will be fully discussed in the chapters dealing with the payment and collection of cheques, but here it may be stated that the general effect of a crossing, so far as it concerns the banker on whom the cheque is drawn, is that he must not pay the instrument *except to another banker*, and if a banker is named in the crossing, then he must pay the instrument only to that banker. In no circumstances should a crossed cheque be cashed over the counter, for if it is so cashed, then the banker paying the money—whether he is the banker on whom the cheque is drawn or a banker who will subsequently have to collect the proceeds—will be liable to the true owner of the instrument if the funds are paid into wrong hands.

Accordingly, anyone crossing a cheque is assured that, if it is lost or stolen, it cannot be cashed over the counter by a banker without his running the risk of having to refund the money so paid to the true owner of the instrument. The addition of the words "Not negotiable" is an added safeguard, for anyone who takes a cheque so marked takes it at his own risk, and no title to the property in the instrument can be obtained by or through

<sup>1</sup> *Law of Banking*, 3rd edn., page 170.

any holder who is not strictly entitled to it. "However many hands the cheque may have passed through, the ultimate transferee, even if otherwise a holder in due course, cannot, as against the true owner, assert any right or title to it or the proceeds, or defend any action for conversion or money had and received".<sup>1</sup>

It is not always appreciated that the effect of a crossing applies equally to a *bearer* as to an order cheque. The fact that a crossed cheque is payable to bearer merely dispenses with the necessity for indorsement, and if it is crossed "Not negotiable", it can neither be cashed over the counter nor retain the characteristics of full negotiability.

### Who may Cross a Cheque.

By Section 78 of the Bills of Exchange Act it is provided that :—

78. A crossing authorised by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing.

It follows that as the crossing is a material part of a cheque and has a definite effect on the payment of the instrument, there should be some guiding principles as to how crossings may be made. These rules are contained in Section 77 of the Act, and read as follows :—

77. (1) A cheque may be crossed generally or specially by the drawer.

(2) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3) Where a cheque is crossed generally the holder may cross it specially.

(4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable".

(5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

From these provisions it will be clear that the drawer or any holder—including the collecting or paying banker—has power to cross a cheque or to convert a general crossing into a special crossing or to add the words "Not negotiable", if these do not already appear. In accordance with these powers, every banker in practice makes a point of crossing specially to himself all cheques paid in either for collection or payment, with the object of ensuring in the case of cheques drawn on other bankers that the proceeds of the cheques will be paid to the banker named in the crossing and to no other.

In view of the provisions of Section 78 that a crossing is a material part of a cheque, and that it cannot be altered otherwise than is sanctioned by Section 77, a banker should not pay cheques

<sup>1</sup> Paget, *Law of Banking*, 3rd edn., page 173.

presented to him which bear evidence that the crossing has been materially altered or obliterated. Thus if a crossing has obviously been erased, or if the name of a banker or the words "not negotiable" have been crossed out, the cheque should be returned to the person or bank presenting it with a request that the erasure or alteration shall be confirmed by the drawer.

### "Opening" a Crossing.

Considerable care needs to be taken by a banker in respect of cheques upon which the crossing has been cancelled or neutralised, or as it is technically termed, "opened". This is effected by the drawer writing the words "Pay cash" or "Please pay cash" either across the top of a crossed cheque or alongside the crossing, the words being accompanied either by his signature or by his initials. The object of the cancellation is to relieve the paying banker of his obligation to pay the amount of the instrument only to another banker, and to free him from liability if he cashes the cheque over the counter. Customers who have no uncrossed cheques available sometimes adopt the practice either in order to obtain cash themselves, or in order to make a payment to a person who has no banking account and who wishes to receive cash for the cheque.

The practice here referred to is not sanctioned by the Bills of Exchange Act, and, although it has received a certain degree of recognition in the Courts, it should be strongly discouraged because of the risk to the paying banker, that the initials or the signature of the drawer may have been forged by someone who has found or stolen the instrument. If a cheque of this description is presented for encashment by the drawer himself, or by the payee who is well known to the banker, the risk is slight, but a banker would undoubtedly be liable to the true owner of the instrument, and also unable to debit its amount to his customer, if he paid out the money and it subsequently turned out that the signature or initials of the drawer were forged by someone who had found or stolen the cheque.

It must be remembered, too, that once a crossed cheque is issued the drawer himself has no right to alter or add to the original form of his mandate, if by so doing he is likely to prejudice a lawful holder, and he may render himself liable to the true owner if the cheque is paid in a condition different from that in which the latter received it.

Fortunately, the practice of opening crossed cheques is now becoming less common, chiefly as a result of the decision taken by the London clearing bankers that no opening of a crossing would be recognised by them unless the alteration was accompanied by the full signature of the drawer, and then only if the cheque was presented for encashment by the drawer himself or by his authorised and known agent.

### Not Transferable Cheques.

A very clear distinction must be made between a cheque which is crossed "Not negotiable" and one which is not transferable in its origin by reason of its containing words prohibiting transfer or indicating an intention that it should not be transferable (Section 8 (1), see *ante*, page 208). An example of an instrument of the latter type is one drawn payable to "Thomas Robinson *only*", having the words bearer or order struck out, and with or without the words "Not transferable" written across the face of the instrument.

A "not transferable" cheque of the kind here referred to must be paid to the payee specified and to him *only*. In no circumstances should such a cheque be collected or paid by a banker if it bears evidence of having been transferred, otherwise the collecting banker will render himself liable for negligence, and the paying banker for disobeying the mandate of his customer. Thus, a cheque which is "not transferable" differs essentially from a "not negotiable" cheque, for, as we have seen, the latter can be passed from hand to hand and paid even though it bears evidence of having been transferred, subject to the fact that if there is any defect in the title of one of the holders, then that holder and subsequent holders will be liable to recoup the true owner.

### Inchoate Cheques.

The provisions of Section 20 of the Act (see page 237), relative to the completion of an inchoate or incomplete bill by the holder, apply equally to a cheque which, when issued by the drawer, is wanting in any material particular. It is most important to note that, while the section lays down that the document must be "delivered by the signer in order that it may be converted into a bill" (including a cheque), and also that it must be "filled up within a reasonable time, and strictly in accordance with the authority given", it, nevertheless, further provides that, if such an instrument comes into the hands of a holder in due course after completion, it will be valid and effectual in his hands even though it has not been completed in accordance with these provisions.

It follows, therefore, that the drawer of a cheque runs considerable risk if he issues a signed cheque without filling in the particulars as to amount or name of the payee, for if a wrong amount is filled in and the cheque is subsequently presented for payment by a holder in due course, the latter will be in a position to enforce payment even though the amount of the instrument is much in excess of the drawer's original instructions for its completion. But payment cannot be enforced by anyone other than a holder in due course, as, for example, a holder who has not given value for the cheque. Thus in *Paine v. Bevan & Bevan*,

1914, a person signed a blank cheque and handed it to a confidential clerk to fill in the name of the payee. The clerk filled in a wrong name, and it was held that the drawer was *not estopped* as against a holder who had not given value from saying that it was wrongly filled up as regards the payee's name. The drawer was therefore entitled to recover the amount of the cheque from such holder who had obtained payment from the bank.

To avoid difficulties of this kind, and also in order to provide against material alterations of the amount such as are discussed below, it is usual for the drawer of cheques handed to an agent or employee for completion to stamp them across the face with some such words as "Under ten pounds", or "Not over twenty pounds", in which cases no more than the maximum amount specified will be paid upon presentment. Although words such as those given have no statutory authority, a banker who paid more than the sum specified would undoubtedly be liable to his customer in respect of the excess payment.

From the section it is clear, however, that the person to whom an inchoate cheque is handed by the drawer for completion has *prima facie* authority to complete it in respect of the date, name of the payee and amount, and the drawer will not thereafter be in a position to object if the completion is effected in a reasonable time and strictly in accordance with the authority given at the time of issue. Nevertheless, if a cheque wanting in some material particular is presented for payment by anyone, other than the drawer, the paying banker should not in any circumstances permit the holder to insert the details which are missing, but should insist on marking the cheque with an answer indicating that certain essentials are absent. This course is necessary in the interests of the banker himself and of the drawer.

### Material Alteration.

By virtue of the provisions of the Bills of Exchange Act, Sections 64 (see page 236) and 78 (see page 263), any alteration of the date, sum payable, place of payment and crossing on the face of a cheque is *material*, and, unless it is made with the drawer's consent and is confirmed by his signature or initials, the alteration will render the cheque void except as against the party who has himself made, authorised or assented to the alteration, and subsequent indorsers. This general rule is, however, subject to the exception that a holder in due course can enforce payment according to its original tenor of a cheque which bears a *non-apparent* alteration, and also to the exception that the crossing on a cheque can be altered by a holder and by the collecting banker in accordance with the provisions of Section 77, already quoted. Moreover, as is explained below, the drawer of a

cheque the amount of which has been fraudulently altered cannot avoid liability thereon if he has carelessly facilitated the alteration.

Subject to these exceptions, the drawer cannot be debited with a cheque which has been materially altered without his consent since its first issue by him, and it is therefore imperative that a banker paying cheques should see that any alterations thereon are duly confirmed by the initials of the drawer or preferably by his signature. Otherwise, if the banker pays a cheque which has been materially altered without the consent of the drawer, he runs the risk of being held liable for the amount, owing to his having paid away funds contrary to his customer's mandate.

In the case of cheques signed by more than one person, or signed on behalf of a limited company, corporation or other body, material alterations should be confirmed by the initials or signatures of *all* the persons signing the cheques. Thus alterations on cheques signed by *two* parties to a joint account should be duly initialled or signed by *both* parties, but if either party has authority to sign cheques alone, the initials or signature of one will suffice, and that one person need not necessarily be the one who originally signed the instrument. Similarly, alterations in a cheque issued on behalf of a joint-stock company should be initialled or signed by the signatories, but if, for example, any two of several directors have power to sign cheques on behalf of the company, it will presumably be in order if an alteration is confirmed by the initials or signatures of two directors other than those who originally signed the instrument. In no circumstances should a banker accept the initials or signature of a secretary alone in confirmation of alterations on a company's cheques, unless the secretary alone has power to issue and sign such instruments, which is unlikely.

An alteration frequently seen in practice is that of the words "or order" on the face of a cheque to "or bearer", in consequence of which the instrument becomes payable to the holder for the time being. An alteration of this kind can be made by the drawer and by him only, and if made should be clearly confirmed by his initials or signature, or by the initials and signatures of all the drawers, if there are more than one. On the other hand, the drawer or *any holder* of a cheque can alter the words "or bearer" into "or order", thereby making the instrument payable to order, or any such person may achieve the same result by merely crossing out the words "or bearer" if they appear, thereby automatically making the instrument payable to order. These points are not covered by the Bills of Exchange Act, but presumably the alteration of a bearer cheque to order is sanctioned because it is not in favour of the holder, but on the contrary is an added protection to the drawer.

### Alteration of the Sum Payable.

The greatest risk of alteration to a cheque is clearly that of the sum payable. Unfortunately, customers frequently draw cheques in such a way that alterations of this kind are by no means difficult to effect. Sometimes, indeed, it is possible to make a considerable variation in the amount in such a way that only the minutest investigation would render the alteration apparent. Thus a cheque for £6:0:0d., in which spaces have been left after the word "six" and the figure "6", could be most easily altered to £60:0:0d. by changing the items mentioned into "sixty" and "60" respectively. Several other examples could be quoted, but it is obvious that carelessness on the part of a customer in filling up his cheques can give rise to considerable difficulties in this connection.

Until recently it was considered that, so far as the drawer was concerned, the material alteration of the amount on the face of a cheque was similar to any other material alteration in its effect of avoiding the instrument except as against a holder in due course, and of rendering the banker who paid the wrong amount liable to stand the loss as having made a payment contrary to his customer's mandate. The question was thoroughly examined in the famous case, *London Joint-Stock Bank v. MacMillan and Arthur*, 1918; wherein it was finally decided by the House of Lords that a banker cannot be held liable for having paid a cheque the amount of which has been fraudulently altered *if the customer, by his negligence in drawing the cheque, has facilitated the alteration.*

In this case a clerk of the firm MacMillan and Arthur presented for signature to one of the partners a cheque which he had prepared ostensibly for £2, but with spaces left after the figure 2 and with no amount written in the body of the instrument. Having obtained the signature, he altered the cheque to £120 and, the alteration not being apparent, received the money from the bank and absconded.

The firm maintained that the bank was liable and that the cheque, having an unauthorised material alteration, could not be debited to their account. This view was upheld both by the Judge at the trial and by the Court of Appeal. The case was, however, taken to the House of Lords, which reversed the previous decisions and gave judgment in favour of the bank, entitling it to debit the account of the drawers. In the course of his judgment Lord Findlay said: "A cheque drawn by the customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty between himself and the banker, and he will be responsible to the banker for any



loss sustained by the banker as a natural and direct consequence of this breach of duty . . . the customer is bound to take usual and proper precautions to prevent forgery ”.

In future, therefore, a banker will not render himself liable by paying in good faith a cheque which bears a *non-apparent* alteration of the amount if, by his negligence, the customer has facilitated that alteration. But it must be understood that this decision is in no sense intended to relieve a banker of his duty to scrutinise carefully all cheques before he pays them in order to discover whether any alteration has been made, and he will still most certainly be liable if he pays a cheque bearing an apparent alteration which has not been confirmed by the signature of the drawer. At the same time, bankers cannot do better in the interests of themselves and of their customers than to encourage the drawers of cheques to adopt the practice of writing or impressing across the face of all cheques issued some such words as “Under ten pounds”, or “Not exceeding twenty pounds”. By so doing the drawer necessarily limits the extent to which alterations can be effected, and, as already stated, it is imperative that the paying banker should ensure that the amounts of cheques paid by him are in no cases in excess of the limits imposed by such expressions written across the face of the cheques.

Unusual material alterations sufficient to affect the validity of a cheque if made without the drawer's consent are the deletion of the words “Not negotiable” on the face of the instrument, and the alteration of the name of the branch at which the cheque is payable. The former is, of course, a material alteration of a crossing such as is prohibited by Section 78, while the latter falls within the purview of Section 64 (a), as being an alteration of the place of payment of the cheque. The alteration of the name of a branch might be made, for example, by the cashier at a branch at which the drawer originally had his account when that account has been transferred to another branch, but only the drawer of the cheque has a right to make such an alteration, and the correct procedure is to return the cheque marked “Drawer's account transferred to another branch”. (See *Questions on Banking Practice*, No. 481.) If the alteration is made, the cheque becomes void as against any parties who have not consented to the alteration and, if it is subsequently dishonoured, they cannot be sued by the holder.

### Cancellation of a Cheque.

In accordance with Section 63 (see Chapter 17), a cheque is discharged when it is intentionally cancelled by the holder or his agent, and in such a case any party liable on the instrument is entirely freed from his liability. Cancellation may be effected either by totally destroying the cheque, by tearing it up, or by marking it clearly in some way across the face with the obvious

intention that it shall thereafter be regarded as cancelled. Thus, in practice, banks cancel all cheques which they have paid by crossing out the drawer's signature, and stamping the word "Paid" across the face of the instrument.

If the cancellation is made intentionally by the holder, the drawer and any indorsers prior to the holder are discharged, but, as is indicated by Section 63, a cancellation is inoperative if it is made unintentionally, or by mistake, or without the authority of the holder. Thus it sometimes happens that a bank cashier by mistake cancels the signature of the drawer on a cheque which is not drawn on his branch. In such a case the cheque is not discharged, and the cancellation may be annulled by the cashier writing across the top left-hand corner of the cheque some such words as "Cancelled in error at Northtown branch, J. R. Thomson, Cashier".

It may be added that it is one of the duties of a senior official at each branch to ensure that the signatures of the drawers of all cheques paid at the branch are clearly cancelled, and that the cheques are stamped "Paid" before being finally sorted away.

### Mutilation of a Cheque.

A cheque is mutilated when it bears evidence of having been torn or when some part of the instrument is missing. As a rule, mutilation of this kind is accidental, and may result, for example, from carelessness in taking a cheque out of the envelope in which it has been sent by post. On the other hand, the mutilation may indicate that it was the intention of the drawer or of the holder of the cheque to cancel or annul it, but that the pieces had thereafter been fraudulently appropriated, and negotiated or presented for payment after having been pasted together. Accordingly, it is of first importance that a banker to whom a mutilated cheque is presented should refuse payment unless the mutilation is confirmed by the signature or initials of the drawer, or by the signature of the collecting banker. Mutilated cheques which are not so confirmed should be returned with the answer "Mutilation requires confirmation" or simply "Mutilated cheque", for if they are not so returned the drawer may hold the banker liable for having paid a cheque which he or a subsequent holder had intended to annul.

### Lost Cheques.

It is only reasonable that the holder of a cheque should not lose his rights against the drawer or any other prior party because the instrument has been lost or accidentally destroyed, and, therefore, Section 69 (see *post*, page 242) provides that when a cheque is lost the holder may compel the drawer to give him another cheque in identical terms, provided the drawer is indemnified against any claims which may be made if the lost

instrument is found again. Moreover, it is provided by Section 70 (see *post*, page 243), that the loss of a cheque is no defence to any action or proceeding on it, provided the holder is willing to give a satisfactory indemnity to the drawer.

In the event of the loss of a cheque being reported, the drawer should give immediate instructions to his banker to stop payment of the lost cheque, while the holder should protect himself by at once giving notice of the loss to any parties to the instrument prior to himself. At the bank particulars of the lost instrument will be inserted in red ink on each page of the relative account for the guidance of the ledger keeper until news is received of the finding of the cheque, or until it has become so long out of date that payment would not be made if it were presented. In the event of a lost and stopped cheque being presented for payment, the banker on whom it is drawn should return it with the answer "Payment stopped", and should at once notify the drawer of the fact, giving the name and address of the holder. When the duplicate is paid a note of the fact that it is the duplicate of a lost cheque should be made against the entry in the ledger account. It may happen that a lost cheque is presented for payment to the drawee banker before payment has been stopped, and in such a case he will be compelled to pay it if he has no grounds for suspecting the title of the presenter. Provided the banker acts in good faith in so paying the cheque, he can charge the amount to the account of the drawer, who, by virtue of the provisions of Sections 60 and 80 of the Bills of Exchange Act (see Chapter 14), is thereafter relieved of his liability on the instrument because payment is regarded as having been made in due course.

It is not always clearly understood why it is necessary to demand an indemnity from the holder in respect of the issue of a duplicate cheque, but in no circumstances should the drawer issue a duplicate unless he is properly protected against claims of third parties, and a consideration of the necessity for this will serve to bring forth some of the relative merits and disadvantages of "order" or "bearer" and of crossed or uncrossed cheques.

In the first place, it is to be noted that if the original cheque is payable *to bearer*, either originally or by the fact that it has been duly indorsed, the drawer will be compelled to pay it to a holder who has taken it in good faith and for value, whether from the finder or some intermediate party, and this applies whether the cheque is crossed or uncrossed, *but provided* that it is not crossed "Not negotiable". Unless, therefore, he is protected by indemnity, the drawer may be compelled to pay *twice*, on the original and on the duplicate, but if he has obtained an indemnity he may, of course, have recourse to the holder to whom the duplicate was given.

If, however, the lost cheque by its terms payable *to bearer* is

crossed "Not negotiable", any person in possession thereof *cannot* enforce payment against the drawer, for, as we have already seen, these words on the face of a cheque indicate that no holder of the instrument can have or obtain a better title than the person from whom he obtained it, and neither the finder of a bearer cheque so crossed, nor anyone to whom he may subsequently transfer it, can claim to have a valid title to the instrument as against the true owner.

Again, if the cheque when lost was by its terms payable *to order*, i.e., because it had not been indorsed by the payee or by an indorsee under a special indorsement (see page 281), then payment *cannot* be enforced against the drawer, since it would be necessary for the finder or person in possession of the instrument to forge the signature of the person to whom by its terms it was payable. As we have seen (page 235 *ante*), a forged or unauthorised signature is wholly inoperative, and the drawer cannot be compelled to pay anyone claiming through or under such a signature. Nevertheless, if the lost cheque has not been stopped, it is possible that the indorsement of the payee or indorsee might be forged and payment obtained from the banker. In such a case the latter would be protected under Section 60 in respect of an open cheque, and under Section 80 in respect of a crossed cheque (see Chapter 14), with the right to debit the amount to the drawer's account so long as the cheque is paid in good faith and in the ordinary course of business. But the fact that payment has been made in this way by the banker does not affect the right of the *true owner* to claim the proceeds from the person who obtained the payment.

### Payment of Debts by Cheque.

In a previous chapter we have remarked upon the fact that a cheque may rightly be regarded as "money" in the wide sense of the term, but although the cheque and the bill are both used extensively for the payment of debts, neither constitutes legal tender currency which a creditor is *bound* to accept in discharge of his debt. Accordingly, unless there is an arrangement between debtor and creditor that payment shall be made by cheque, there is no obligation on the part of the creditor to accept payment in this way, and he is free if he so chooses to refuse to accept such an instrument and to demand payment of his debt in legal tender. On the other hand, if it is customary as between a debtor and creditor that payment shall be made by cheque, or if a cheque is accepted by the creditor without demur, then he will be presumed to have accepted the instrument in payment of the debt due to him, *subject*, however, to the cheque being duly honoured when it is presented for payment.

Payment by cheque or bill of exchange is, in fact, generally

regarded as a *conditional* payment, unless there are circumstances which indicate that the instrument was accepted in final discharge of the debt. The condition is, of course, that the debt will be revived if the cheque is not duly honoured when it is presented to the drawee, but until such a presentment has been made and payment refused, the creditor has no right to sue the debtor in respect of his obligation. As we have already noticed, he retains his right of action on the written instrument until six years from its original date, so long as he cannot be held, under Section 74 (see *ante*, page 257), to have discharged the debtor from his obligation by reason of having neglected to present for payment or of having unduly delayed presentment of the instrument for payment. If the neglect of the creditor to obtain payment of a cheque or bill has prejudiced the position of the debtor, then the latter will be discharged to the extent of the damage suffered by the delay, in respect of his liability both on the instrument itself and on the debt for which it was given. Moreover, any endorsers of the cheque will be entirely discharged, by virtue of Section 45 (see *ante*, page 257). It may be finally noted that the obligation of a debtor from whom a cheque has been taken in payment may, in some cases, be regarded as having been discharged even though the money has not been received by the creditor. This may arise if the cheque is lost or misappropriated after it has reached the creditor's hands, and is paid in due course by the drawee banker. As we have seen in considering lost cheques, a banker is compelled to pay a bearer cheque if it is in order and he is satisfied regarding the *bona fides* of the presenter, while he may in good faith pay an order cheque on which the endorsement of the payee or endorsee has been forged, with the right, in both cases, to debit the amount to the drawer's account. Clearly, the drawer having thus paid once cannot be called upon by his creditor to pay a second time, and in such circumstances the remedy of the creditor is against the finder or thief who has wrongly obtained payment of the instrument.

### Payment by Cheque Through the Post.

A very large proportion of cheque payments are made through the medium of the post, and as the instruments are sometimes lost or stolen during transmission, it is of importance to determine who must bear the loss if a cheque is presented and paid, for the Postmaster-General refuses to accept any responsibility for loss in such circumstances unless the letter is registered.

The general rule of law is that, as between the sender and the addressee, the loss, if any, will fall upon the person *who first makes the post office his agent* for the purposes of the payment, but this is frequently a matter that cannot be decided until after an investigation of the intentions of the parties and the

circumstances of the particular case. In the majority of cases the Post Office is the agent of the sender, for it is he who usually decides to make the payment by this means, and if such is the case the sender must bear any loss which may ensue by reason of the cheque having been lost or stolen before it reached the addressee.

On the other hand, there may be circumstances which, in the opinion of a judge or of the Court, make the Post Office the agent of the creditor, i.e., the person receiving the money, as, for example, where he definitely requests that payment shall be made by cheque forwarded to him by post. In such a case, delivery of the cheque to the Post Office is regarded as delivery to the agent of the creditor, and the latter must bear any loss which may arise during the time when the cheque is in the hands of that agent. In most of the cases where it is sought to show that the Post Office is the agent of the creditor, however, it is not always easy to rebut the general presumption that the Post Office is the agent of the sender, particularly as the rule of law that the debtor must seek out and pay his creditor is in favour of this assumption.

Furthermore, the Courts tend to free the creditor from liability in this respect if it can be shown that the method of payment adopted by the sender differed in the slightest degree from that which was prescribed by the creditor, or if it differed in any way from the usual course of business between the parties. Thus, if over a period of years payments by the sender were made by *crossed* cheques, the presumption would be that any loss should fall on the creditor, by reason of the fact that he will be regarded as having acquiesced in the method of payment and adopted the Post Office as his agent for obtaining payment. But if the sender departed from the usual practice and sent an *uncrossed* cheque, which was lost or stolen in course of transmission, then he would be held liable to stand the loss by reason of having made the Post Office his agent for a new mode of payment.

For these reasons it is of first importance that the instructions of a creditor as to the making of remittances should be explicitly obeyed. Thus if it is prescribed on an invoice or statement of account that cheques should be made payable to "Henry Brown & Co., Ltd.", and crossed "Midland Bank, Bedford", the instruction would be regarded as an indication that the creditor had adopted the Post Office as his agent for obtaining payment by cheque crossed in the manner directed; and, if it can be shown that the debtor had strictly adhered to the usual course of business, and to the conditions prescribed by the creditor, then the debtor will be freed from his liability both on the cheque and on the debt in respect of which it was drawn, if the instrument is lost or stolen and is paid in due course under the conditions referred to in the preceding paragraphs. But if the instructions

regarding the crossing were not strictly adhered to by the sender, or if the cheque was not crossed at all, or if the cheque was sent by hand instead of by post, he would no doubt have to bear any loss which arose during transit.

It must be remembered that, even when a cheque has reached the creditor, it is merely a *conditional* payment, whether the Post Office is the agent of the sender or of the creditor, for, as has been already pointed out, the debt against which the cheque is drawn is at once revived when the cheque is dishonoured, unless there is an express agreement by the creditor that the cheque itself shall be regarded as a final and conclusive settlement, in which case there is a right of action on the cheque only.

### Special Cheque Forms.

Reconsideration of the matters discussed in the foregoing paragraphs will make it clear to the reader why bankers have adopted the practice of issuing special cheque forms for the use of their customers. There is apparently no *obligation* on the part of a customer to use these forms, unless it can be regarded as an implied condition of his contract with the banker, and a cheque is perfectly valid as an order on a banker if it is drawn on any kind of paper, blank or otherwise, so long as the intention of a customer is clear and unmistakable, the "requisites as to form" properly complied with, and the correct stamp duty affixed to the document. If the mandate is clear and intelligible the banker must act upon it or risk liability for injury to his customer's credit.

It will be obvious, however, that there are many objections to the indiscriminate use by customers of sundry pieces of paper on which to draw their cheques, and apart from achieving uniformity of design, colour and wording, the special forms issued by bankers have the advantages of being printed in such a way that fraudulent alteration or erasure is made particularly difficult to accomplish. In addition, the consecutive numbering of the cheque forms and the registration of particulars of each cheque-book issued, enable the banker without difficulty to trace the customer who should be in possession of particular cheques.

It follows, therefore, that unless arrangements are made for the use of cheques of special design bankers should, in their own interests, make it a condition of the acceptance of accounts that the regular forms issued by the bank are to be used by customers in drawing cheques, and on their part customers cannot do better to safeguard themselves than by utilising the forms with which they are gratuitously supplied.

## CHAPTER 13

### THE INDORSEMENT OF CHEQUES AND BILLS

THE term "indorsement" is yet another of the many terms met with in banking law and practice of which no statutory definition exists, in spite of the fact that the words "indorsement" and "indorser" are frequently used in the Bills of Exchange Act, 1882. Fortunately, however, both terms occur so commonly in banking and general commercial practice that it is not difficult to determine their exact significance, which is also fairly clearly indicated by the provisions of the Act referred to and by a number of judicial decisions in the Courts.

In the first place, it may be pointed out that the word indorsement is derived directly from the Latin words *in dorsum*, meaning "on the back", and accordingly the term "indorsement" is applied in a general sense to mean any writing (and not necessarily a signature) upon the back of a document, as, for example, a deed, insurance policy, or bill of lading.

In reference to cheques and bills of exchange, however, the word may be defined as the writing on the back of the instrument by which a cheque or bill payable to order and the value it represents is transferred or negotiated from one person (called the *indorser*) to another (called the *indorsee*).

The indorsement on the back of a cheque or bill is, in fact, evidence of its transfer or "negotiation" from one person to another, the *transferor* indicating by his signature his desire to pass the instrument and any rights connected with it to another person, who is known as the *transferee*. In connection with the negotiation of bills of exchange generally, Section 31 of the Act provides as follows :

31. (1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(2) A bill payable to bearer is negotiated by delivery.

(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

(4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

(5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.



From these provisions it will be seen that a bill of exchange or a cheque payable to bearer is negotiated when there is "delivery" from one person to another, i.e., a transfer of possession, actual or constructive (Section 2). *Actual* delivery exists, of course, when the instrument is handed by the transferor to the transferee or his agent, but it is not always so easy to show that a *constructive* delivery has taken place. Constructive delivery would exist, for example, where the transferor informs the transferee that the instrument which he proposes to transfer is in a certain drawer, from whence it may be removed at the transferee's convenience, but it is sometimes difficult to prove such a delivery if there is no evidence of the matter in writing.

In accordance with Section 31 (2), a bill payable to bearer is negotiated merely by the transfer of the instrument from one person to another, and as the transferor does not indorse the instrument negotiated, it follows that he cannot be held liable *in respect of his signature* by any subsequent transferees. A holder who thus negotiates a bearer bill or cheque is called a "transferor by delivery", but it is advisable for anyone taking a cheque, whether it is payable to bearer or not, to demand the signature of the transferor as evidence of his liability either as a transferor or indorser. Moreover, it will be observed that by Section 31 (3) the indorsement of a cheque is not effective as a legal transfer of the instrument unless it is completed by actual or constructive delivery, made according to the provisions of Section 21, already discussed on page 217. Thus, the signature of a payee on the back of a cheque will not operate as an indorsement of the instrument and as a transfer of the value therein if the payee can show that, although he had indorsed the cheque, he had not actually handed it to the transferee or given the latter to understand that the cheque was at his disposal.

Again, except as against a holder in due course, an indorsement would not be effective against an indorser if the latter could show that, after signing the instrument, he had transferred it to another person for a special purpose only, as, for example, to be held in safe keeping, or for any other specific purpose, such as to meet a bill of exchange.

If delivery is made subject to a condition, then it does not become effective so far as the transferor is concerned until that condition is fulfilled. Thus a cheque may be handed by the drawer to a payee on condition that the latter undertakes a certain journey, but if the journey is not fulfilled, the payee cannot effectively sue the drawer in respect of the proceeds of the instrument. Nevertheless, it will be observed that by Sub-section 21 (3), a valid and unconditional delivery is *presumed* until the party seeking to evade liability proves that a complete delivery has not been made by him, but in no such circumstances as are here discussed can such a party evade liability to a holder in due course.

Sub-section 31 (4) gives the transferee the right to demand the indorsement of the transferor, if a cheque or bill payable to the transferor's order is transferred without indorsement. The object of this is twofold. Firstly, properly to convey the title in the instrument to the transferee, and, secondly, to make the transferor definitely liable as an indorser by his signature on the instrument. If the signature is not obtained the *transferee* cannot sue on the instrument in his own name or transfer the property therein to any other person merely by signing his own name, and he cannot, of course, sign the name of the transferor unless he is expressly authorised to do so.

Thus in *Walters v. Neary*, 1904, a person drew a bill to his own order, which was duly accepted and discounted with a person, X. By mistake the drawer omitted to indorse, so X signed the drawer's name on the instrument, although he had no authority to do so. X could not recover from the acceptor for he had no right to indorse, but he could legally compel the drawer to indorse the instrument.

When an indorsement is obtained from the transferor in accordance with the powers conferred on the holder by Section 31 (4), the transfer of the instrument takes effect from the date of the indorsement and not from the date of negotiation. This point is of importance in relation to the question of negotiation within a reasonable time in order to hold the indorser liable. (See page 256.)

The last provision of Section 31 is not in conflict with the general rule relative to agents which we have already discussed (see page 225, *ante*), that personal liability is excluded by the agent when he expressly indicates that he is signing for or on behalf of a *named* principal. For this purpose a *per procuracion* signature is quite adequate if the agent signs under authority. By virtue of the Sub-section, however, an agent may unmistakably indicate his intention not to be bound by adding after his signature the words "*sans recours*", or "without recourse to me". This Sub-section also covers the case where an executor or administrator is under the necessity of indorsing cheques or bills payable to a deceased, in which case the personal representative (e.g., James Brown) may indorse:

James Brown,  
Sole Executor of Thomas Robinson, deceased,  
(Without recourse to me).

or:

James Brown,  
Sole Executor of Thomas Robinson, deceased,  
(So far as assets only).

In the latter case the indorser accepts liability on the instrument only to the extent to which the assets of the deceased will enable him to pay.

### Requisites of a Valid Indorsement.

Although the Act does not explicitly define an indorsement, Section 32 nevertheless clearly defines the requisites of a valid indorsement in the following terms :—

32. An indorsement in order to operate as a negotiation must comply with the following conditions, namely :—

- (1) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient.  
An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognised, is deemed to be written on the bill itself.
- (2) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.
- (3) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.
- (4) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described adding, if he think fit, his proper signature.
- (5) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.
- (6) An indorsement may be made in blank or special. It may also contain terms making it restrictive.

As an indorsement must be written *on the bill itself*, a separate promise in writing to indorse, or an assignment of a bill or note by a separate instrument, is not an indorsement. Moreover, by virtue of Section 2, an "indorsement" means an indorsement completed by delivery, so the mere fact that the signature of the payee or indorsee appears on the back of a bill or cheque does not constitute that signature an indorsement unless the signer has given effect thereto by delivering the instrument. But such delivery may be *actual*, i.e., the definite transfer of the instrument, or *constructive*, e.g., when the indorser gives notice to the indorsee that the instrument is lying duly indorsed in a certain drawer or in the hands of a certain agent.

An "*allonge*", such as is referred to in Sub-section 32 (1), is a piece of paper which is gummed or pasted to one end of a bill or cheque with the object of providing additional space for further indorsements when the back of the cheque or bill is already covered. It is, of course, not often that a bill or cheque is negotiated so many times that an allonge becomes necessary, but the device is sometimes met with in connection with foreign bills of exchange. *Copies* of a bill are not recognised in this country unless they form part of a bill in a set as provided by Section 71 (see Chapter 11), but in those countries where copies are recognised, room for additional indorsements is sometimes found on a copy or copies of the original bill.

A copy is an exact reproduction of the bill at the time the copy is made, including the face of the instrument and any indorsements appearing on the back. Under the last indorsement copied a line is drawn, and the words "So far copy" are added, any subsequent indorsements being written under the line.

Although it is usually advisable for indorsements to be made on the *back* of bills and cheques, it should be noted that Sub-section 32 (1) merely provides that an indorsement shall be "written on the bill itself", and it follows, therefore, that an indorsement written on the *face* of a bill of exchange or cheque is quite in order in spite of its inconvenience.

*Partial* indorsements, such as are referred to in Sub-section 32 (2), are rarely seen in practice, but typical examples would be special indorsements in the following terms on a cheque for £100: "Pay Thomas Robinson or order sixty pounds", or "Pay Thomas Robinson sixty pounds and James Brown forty pounds". Both indorsements may operate as an authority to receive payment of the amount specified, but are invalid as a negotiation of the bill, so that the indorsees can neither sue on the instrument nor further indorse in order to transfer the property therein.

In connection with Sub-section 32 (3), the custom whereby dividend warrants payable to two or more persons may be indorsed by any one of the parties is expressly saved by Section 97 (3). (See Chapter 19.)

### Classes of Indorsement.

The Bills of Exchange Act, 1882, refers to seven classes of indorsement: (a) *Partial* indorsements, which are referred to in the preceding paragraph; (b) Indorsements *in blank*; (c) *Special* indorsements; (d) *Conditional* indorsements; (e) *Restrictive* indorsements; (f) Indorsements *negating* or limiting the liability of the indorsers; (g) *Facultative* indorsements, i.e., waiving some or all of the holder's duties.

Each of these classes is governed by special sections or sub-sections of the Act, which, with the exception of Section 32 (2), concerning *Partial Indorsements*, are discussed in the following paragraphs.

### Indorsements in Blank and Special Indorsements.

Section 34 of the Act distinguishes between indorsements in blank and special indorsements in the following terms:—

34. (1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

(2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

(3) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

(4) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

An example of an indorsement *in blank* would be the signature "Thomas Robinson" on the back of a cheque or bill payable to "Mr Thomas Robinson or order", the signature indicating that Thomas Robinson discharges the instrument in return for payment, or that he transfers his rights therein to some person unnamed. In accordance with Section 8 (3), a bill or cheque on which the *only or last* indorsement is an indorsement in blank, is payable to bearer, and thereafter no indorsement of the instrument is necessary to transfer the property therein.

An example of a *special* indorsement on a cheque payable to Thomas Robinson would be :

" Pay the Acme Cycle Company, Ltd.,  
" Thomas Robinson ",

or :

" Pay James Brown or Order,  
" Thomas Robinson ".

The company in the one case and James Brown in the other are indorsees, and their indorsement is necessary before the instrument can be discharged or transferred to another holder. A special indorsement of this kind may be made by any indorser, and not necessarily by the payee, while in accordance with Sub-Section 34 (4) above, any holder of a bill or cheque originally payable *to order* may convert the last blank indorsement thereon into a special indorsement, and thereby make the instrument payable to order, although by reason of the blank indorsement it had become payable to bearer. For this reason a special indorsement is said to *control* or override a previous indorsement in blank, but it must be clearly understood that a special indorsement on a bill originally made payable *to bearer* has no effect and does not make the instrument payable to order. Sometimes the holder of a bill or cheque which is not payable to himself takes advantage of the provisions of this sub-section to make the instrument payable to a transferee without himself incurring the liabilities of an indorser. This he does by writing above the signature of the last indorser the words " Pay . . . or order ", and including the name of the transferee, thus making the instrument payable to order, and making necessary the signature of the transferee before the cheque or bill can be negotiated. Thus, if Thomas Robinson comes into possession of an order cheque which he wishes to transfer without his signature to James Brown, and the name of the last indorser is Henry Arnold, Robinson may write the words, " Pay James Brown or order ", above Henry Arnold's signature. The cheque cannot

thereafter be paid unless it is indorsed by Brown ; while Robinson would escape liability in respect of an indorsement by him *on the instrument*. Nevertheless, he is liable as a transferor in accordance with Section 58 (3). (See Chapter 16.)

### Conditional Indorsements.

A conditional indorsement is not defined in express terms by the Act, but may be stated to be an indorsement which makes the transfer of the property in a cheque or bill by the indorser to the indorsee dependent upon the fulfilment of a stated condition. Examples of such an indorsement would be :

“ Pay Thomas Robinson or order on the arrival of  
s.s. Majestic at Montreal,

James Brown.”

“ Pay Thomas Robinson if he marries Anne Taylor,  
James Brown.”

“ Pay Thomas Robinson ten days after the death of  
William Brown,

James Brown.”

As between the indorser and the indorsee the condition would presumably be operative, so that, if payment of the instrument was received by the indorsee, although the condition had not been fulfilled, he would be regarded merely as having received the money in trust for the indorser. Nevertheless, Section 33 protects the payer of a cheque or bill in such circumstances by providing that :

33. Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.

This provision is clearly of great advantage to bankers, who will usually have no means of satisfying themselves whether a condition has been fulfilled or not. Moreover, it would clearly be illogical to affect the payer of a bill or cheque with a condition in an indorsement when the order addressed to that payer by the drawer cannot be made conditional. On the other hand, the section provides that the power to disregard a condition in an indorsement is *optional*, so that the payer may *if he chooses* refuse payment until he has proof that the condition has been fulfilled.

### Restrictive Indorsements.

A restrictive indorsement is somewhat similar in its effect to an indorsement which is conditional, and is thus defined by Section 35 of the Act :

35. (1) An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed “ Pay D. only ”, or “ Pay D. for the account of X. ”, or “ Pay D. or order for collection ”.

(2) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorise him to do so.

(3) Where a restrictive indorsement authorises further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

It is clear from a perusal of this section and of the preceding paragraph that restrictive and conditional indorsements are both types of special indorsement in which the name of the indorsee is specified for the protection of the indorser. A restrictive indorsement prohibiting transfer has, in fact, exactly the same effect as words in the body of the instrument inserted for that purpose, e.g., "Pay James Brown *only*."

While Sub-section (1) gives all the rights of an ordinary holder to the indorsee under a restrictive indorsement, it limits his full capacity to deal with the instrument in the respect that he cannot transfer his rights unless, *from the words employed*, it can be assumed that he has power to do so.

Thus, if a bill is indorsed "Pay D for the account of X", or "Pay D for Collection", D cannot indorse the bill to E so as to give E the right to receive payment on account of X; but if the bill is indorsed "Pay D *or order* for the account of X", or "Pay D *or order* for Collection", then D has a right to indorse to E, since the addition of the words "or order" imply that D has authority to indorse to another party. The rights of all subsequent indorsees where a restrictive indorsement authorises further transfer are defined in Sub-section 35 (3), and may be illustrated as follows: A draws a bill payable to B, who restrictively indorses it to C thus: "Pay C *or order* for my use". C indorses the bill to D, and the bill is subsequently dishonoured by the drawer. D can sue B on the bill, but he is subject to any defence or set-off which B could have had against C. He can also sue A, the drawer; but if A has any defence against B or C he may set up that defence against D.

But in neither of the foregoing cases is any duty imposed on the paying banker to see that the terms of the condition or restriction are observed, although he should not pay without inquiry a cheque or bill which is restrictively indorsed to prohibit further transfer, but which, nevertheless, bears evidence of subsequent negotiation, in the form of one or more indorsements following the restrictive indorsement.

Restrictive indorsements frequently met with in practice are those which specify that the proceeds of a cheque are to be paid only to a specified account, as in the following examples:—

"To be placed to the account of Jones Bros. with the  
Blankshire Bank,  
Jones Bros".

<sup>1</sup> See Questions on Banking Practice, Nos. 742-744.

“ To the credit of Brown and Brown with the Alliance Bank, Manchester,

Brown and Brown ”.

“ Pay to A. L. Turner’s A/c,

B. Backer ”.

“ Please place to the credit of my account,

James Brown ”.

In none of these cases is a further indorsement required, and it would clearly be very difficult for a paying banker to justify his action in paying a cheque bearing one of these indorsements and a subsequent indorsement or subsequent indorsements. Nevertheless, it is as stated no concern of the paying banker to see that the instructions given in such an indorsement are complied with, although a banker *collecting* the proceeds of such a cheque would no doubt be required to see that they are placed to the account specified.

Sometimes additions to an indorsement which are intended to be restrictive may be regarded as invalidating the indorsement as a good discharge, and the cheques in such cases may be returned by the paying banker marked “ Indorsement irregular ”. Examples are :—

“ Credit Thomas Robinson ”.

“ For Lodgment a/c,

Smith, Brown & Jones ”.

On the other hand, additions to an indorsement such as “ Paid in ”, “ Pay cash ”, “ Received without prejudice ”, and “ Received cash ” are in order, but in the last two cases a receipt stamp is required if the amount of the cheque is for £2 or over.

### The Effect of an Indorsement and the Liabilities of an Indorser.

As has been stated, the general effect of an indorsement is to indicate that the person signing desires to transfer to another his rights in and upon the instrument, or that he discharges the instrument in recognition of having received payment. In order to be legally effective an indorsement must, of course, consist of the proper signature of the person who is entitled to indorse the instrument, or his duly authorised agent, since a forged or unauthorised signature is wholly inoperative and confers no right on a subsequent holder to enforce payment of the cheque or bill so indorsed. (Section 24.)

Furthermore, it is of first importance that the authentic or authorised signature of the transferor should be obtained on all cheques or bills negotiated by him so that he may be held liable to subsequent holders as an indorser of the instrument. The



liabilities assumed by an indorser of a cheque or bill are thus set forth in Section 55 (2) of the Act :

55. (2) The indorser of a bill by indorsing it—

- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken ;
- (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements ;
- (c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

Section 56 further provides that :

56. Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

Strictly speaking, a signature on a cheque or bill by a person who is not a holder is not an indorsement, for a person so signing cannot be the *party* to the instrument, in spite of the fact that Section 55 (2) above referred to provides that he will incur the liabilities of an indorser. Such a signature is in effect more in the nature of a guarantee than an indorsement, and on the Continent is described as an "*aval*".

### Negating, Limiting, and Facultative Indorsements.

Section 16 of the Act provides, however, for circumstances in which an indorser may desire to escape the usual liabilities and obligations attaching to the indorsement of a cheque or bill, or where he may wish to waive some or all of his duties as a holder :

16. The drawer of a bill, and any indorser, may insert therein an express stipulation—

- (1) Negating or limiting his own liability to the holder ;
- (2) Waiving as regards himself some or all of the holder's duties.

Thus, if Thomas Robinson is the payee or indorsee of a cheque, and wishes to escape liability thereon in the event of dishonour, he may sign his name on the back of the instrument in the usual way and add the words "*sans recours*" or "without recourse to me" after his signature, in which case a subsequent holder would be unable to proceed against the said Thomas Robinson if the cheque was unpaid. Or he may add the words "*sans frais*" or "without expense", indicating that although he is prepared to accept liability for the amount of the instrument if it is unpaid, he will not bear any expense which may be incurred by the holder in the event of dishonour, as, for example, expenses resulting from the protest of a bill or cheque (see Chapter 17). It must be understood, however, that if an indorser holds a bill or cheque through a prior forgery, the insertion of the words

“*sans recours*” or “without recourse to me” would not enable him to escape liability for conversion to the true owner of the instrument, for a person who holds by virtue of a forgery has no legal title to the instrument, however innocent he may be.

By virtue of Sub-section 31 (5), referred to above, the power to negative liability in respect of a signature on a bill is extended to a person who is under the necessity of signing the instrument in a representative capacity, as, for example, an agent signing in the ordinary way on behalf of a principal, or an executor signing bills or cheques payable to a deceased person.

An indorsement in which the signer waives some or all of the holder's duties is known as a “*facultative*” indorsement. The following is an example :

Pay James Brown or Order,  
William Robinson.  
(*Notice of Dishonour waived.*)

The meaning of this addition is that the indorser does not require the holder to give him notice of dishonour if the bill is refused acceptance or payment.

### Cancellation of an Indorsement.

An indorser (and all indorsers subsequent to him) may altogether avoid liability if his signature is *intentionally* cancelled by the holder or his agent, as is provided by Section 63 (2), discussed in Chapter 17. Bills and cheques are sometimes paid in by customers on which some of the indorsements are entirely obliterated by a black impressed stamp or some other means, and in such cases no action can be taken, in the event of dishonour, against the parties whose signatures have been so obliterated.

### Bankers and Indorsements.

So far as a paying banker is concerned the indorsement of the payee or indorsee is required as an indication that a cheque or bill has been duly paid in accordance with the instructions given by the customer. If, however, an order cheque is actually presented for payment by the payee, and he refuses to sign the cheque in return for receiving the money, the banker should hand back the cheque with the answer “Payee's indorsement required”. He could not thereafter be held liable by the customer for dishonouring the cheque, as it is only in the customer's own interests that a proper discharge should be obtained. Moreover, the banker himself is not bound to assume unusual risks, for if he paid a cheque without indorsement the customer might hold him liable for not following the “ordinary course of business.” Alternatively, the banker can demand a receipt for the payment,

duly stamped 2d. if the amount is £2 or over, and if the payee will not give such a receipt he renders himself liable to a penalty of £10.

Although it is reasonable that a banker should be required to protect the interests of his customers by seeing that indorsements on all cheques and bills paid by him are to all appearances correct and in order, conforming with the requisites of a valid indorsement which have already been indicated, it would not be reasonable to expect the paying banker to accept responsibility for the *authenticity* of all indorsements upon the many cheques passing through his hands. This is the general position taken by the law as embodied in the Bills of Exchange Act, 1882, which lays down in precise terms the protection afforded to bankers who exercise *reasonable care* in relation to indorsements on customers' cheques.

Nevertheless, a banker should in no circumstances pay or collect a cheque or bill if he is not satisfied with the indorsement or indorsements thereon (even if they are in a foreign language), and it is for this reason that the examination of indorsements on cheques and bills paid or collected by a branch bank is entrusted to a responsible official with some knowledge of the technicalities appertaining to indorsements generally. The banker is not concerned with the correctness or otherwise of indorsements on cheques or bills originally made payable to bearer, but in the case of order cheques or bills, it should be seen that *all* indorsements (not merely that of the payee) are in order, and that any *special* indorsements are followed by the signatures of the indorseees specified, for it must be remembered that a cheque or bill originally drawn payable to order, only becomes payable to bearer when the only or last indorsement is an indorsement in blank.

If the paying banker is not satisfied as to the validity or correctness of an indorsement, he should either return the instrument unpaid and marked "Indorsement requires confirmation" or "Indorsement irregular", or, if the instrument is presented for payment by the indorser in person, he should get the latter to correct any defect or verify the signature if it is doubtful. If the banker knows that an indorsement is not in the handwriting of the payee or indorsee, he could not pay or collect the instrument without confirmation of the signature, but he cannot, of course, insist that the writing shall be that of the payee, for Section 91 (1) provides that a signature need not be made by a person's own hand but may be written by or under the authority of the person whose signature it purports to be.

Although it is the duty of a paying banker to satisfy himself regarding the correctness of indorsements, he should not go to extremes and return cheques on account of trifling irregularities, for, apart from the trouble involved, such actions frequently cause annoyance to the presenting banker. Moreover, slight

irregularities on cheques for small amount are not regarded as being of so much importance as in the case of cheques for large sums, so that a small cheque is frequently given the benefit of the doubt when a larger cheque would be returned for confirmation or alteration.

It may be noted also that there is no legal rule as to the order in which indorsements should appear, although it is clearly advisable that the payee's signature should appear first on the back of the bill, and that the signatures of special indorsees immediately follow the relative special indorsements. It may, however, happen that the payee's indorsement does not appear first, particularly when the back of the instrument is crowded with signatures, and in such cases particular care is required to trace the order of transfer and ensure that the payee's signature actually appears, and that all special indorsements are properly completed.

### Indorsements Generally.

The position of bankers in regard to forged indorsements will be dealt with at length in the two following chapters. In the following paragraphs we will confine ourselves to considering what are to be regarded as the correct and recognised forms of the most important varieties of indorsement with which a banker is called upon the deal. As to what is the correct form of indorsement in any particular instance is chiefly a matter of practice, although in certain cases the manner of signing has been recognised by decisions given in the Courts.

The remarks already made regarding the mode of placing a signature at the foot of a cheque apply also to indorsements, and although it is desirable that all indorsements should be wholly or partly in ink, an indorsement is legally valid if made in pencil, or if made entirely by means of an impressed stamp, provided that the impression is made by or under the authority of the payee or indorsee. In practice, however, indorsements in pencil are generally discouraged owing to the liability to obliteration or alteration, but cheques bearing a pencilled indorsement forming one of a series of indorsements and followed by other indorsements in ink, are frequently paid without question (see *Questions on Banking Practice*, No. 972).

Although there is no doubt that the Courts would regard as valid an indorsement made wholly by impressed stamp, if it could be shown that the impression was made by or under the authority of the payee, it is highly desirable, as is pointed out by the Council of the Institute in *Questions on Banking Practice*, No. 974, that such indorsements should be discouraged as far as possible, on account of the facilities which the method offers to fraud, and the difficulty of obtaining satisfactory proof—which a banker is fairly entitled to demand in such cases—

that the stamp was impressed by authority. Similarly, an indorsement entirely in printed characters would not usually be accepted, although there is no question as to its validity.

It should be noted that the remarks in the preceding paragraph apply to indorsements which are made *wholly* by impressed stamp, but no objection can be raised to an indorsement in which the name of the payee is impressed, but the signature in ink of the agent or official is added, as is frequently done in the case of indorsements on behalf of a limited company or local authority.

In the case of a first indorsement on a cheque or bill payable to order, or of an indorsement immediately following a special indorsement, the general rule is that the signature should correspond in its important essentials with the name of the payee given on the face of the instrument or with the name of the indorsee specified in the special indorsement, as the case may be. This means that the *surname* in the indorsement should be identical with the surname given as that of the payee or indorsee, whether it is given correctly or not, for if the name is not correctly given, Sub-section 32 (4) of the Act, already quoted, authorises the holder to sign his name incorrectly in accordance with the spelling as given, adding his proper signature if he thinks fit. On the other hand, it is not essential that *christian* names be written in full, even if they are so given on the face of a cheque or in a special indorsement; but if the indorsee chooses to give his christian name or names in full, then the spelling thereof must correspond exactly with that given on the instrument. Moreover, there is no objection to the christian name being given in full, although initials only are given on the face of the instrument or in the special indorsement. But a surname only will not suffice for an indorsement, even where no christian name or initials is given on the cheque or bill, except in the case of an indorsement by a peer of the realm, in which case the surname alone is the usual signature.

### Courtesy Titles.

As the guiding principle is that an indorsement should be the ordinary form of signature of the payee or indorsee, it is usual in practice to return for confirmation indorsements which include courtesy titles or forms of address, although the indorsement should be regarded as being in order if such expressions are added to a signature with the obvious intention that they should be merely descriptive. On the other hand, it is usual in certain foreign countries to include courtesy titles with indorsements, and accordingly no objection should be raised on this ground to indorsements by foreign payees or indorsees.

With the exception mentioned, a banker should not accept without confirmation indorsements in the form "*Mr Thomas*

Robinson"; "Thomas Robinson, *Esq.*"; "Major Thomas Robinson"; or "*Dr* Thomas Robinson", for the recognised forms of signature in such cases are "Thomas Robinson", with or without the descriptive expressions "Major" or "M.D." in the last two cases. The abbreviation "Mrs" is regarded as a courtesy title and a term of description. (See "Indorsements of Married Women".)

### Indorsements of Individuals.

In accordance with what has been stated, an indorsement by an individual should be a signature in ordinary form agreeing with the name on the face of the instrument, or in the special indorsement, and omitting courtesy titles unless they are added merely as words of description. The following examples will illustrate these points:—

#### Examples of Correct Forms of Indorsement by Individuals.

PAYER.	FORM OR INDORSEMENT.
Mr Thomas Robinson.	Thomas Robinson or T. Robinson.
or	
Thomas Robinson.	Thomas Robinson, Thomas Robertson (where payee's name is correctly Robertson). Thomas Robinson, Senior.
Dr Thomas Robinson.	Thomas Robinson, M.D. Thomas Robinson, F.R.C.S., or simply Thomas Robinson.*
Capt. Thomas Robinson.	Thomas Robinson, <i>or</i> Thomas Robinson, Capt., R.A.M.C.
Thomas Robinson, Esq.	Thomas Robinson.
Mr Thomas Robinson, Senior.	Thomas Robinson or Thomas Robinson, Senior.
— Robinson.	Thomas Robinson.
Sister Emma.	Sister Emma. (See <i>Q. B. P.</i> , No. 910.)

#### Examples of Incorrect Forms of Indorsement by Individuals.

PAYER.	FORM OF INDORSEMENT.	IRREGULARITY.
Mr Thomas Robinson.	<i>Mr</i> Thomas Robinson.	Courtesy title should be omitted in a signature.
"	Thomas Robinson, <i>Junior</i> .	Mr Thomas Robinson is <i>prima facie</i> Thomas Robinson, Senior (see above). Spelling differs.
"	Thomas <i>Robynson</i> .	"
"	<i>Tom</i> s Robinson.	Initials differ.
"	<i>T. P.</i> Robinson.	Full signature required, including christian name or initials.
"	Robinson.	Courtesy title should be omitted.
Thomas Robinson, Esq.	Thomas Robinson, <i>Esq.</i>	"
Pastor Thomas Robinson.	<i>Pastor</i> Thomas Robinson.	"
Dr Thomas Robinson.	<i>Dr</i> Thomas Robinson.	"
Capt. Thomas Robinson.	<i>Capt.</i> Thomas Robinson.	"
"	Thomas Robinson, <i>Lieut.</i>	Description incorrect.
Mr Thomas Robinson, Junior.	Thomas Robinson.	See above; should be Thomas Robinson Junior.

### Indorsements of Married Women and Widows.

The abbreviation "Mrs" before the name of a payee is regarded as a term of courtesy and also as a term of description, thus differing from the abbreviations "Mr" or "Esq.", which are regarded as terms of courtesy only. For this reason a cheque drawn payable to "Mrs Thomas Robinson" should be indorsed by the usual signature of the payee, followed by words indicating that she is either the wife or widow of Mr Thomas Robinson, as, for example, "Jane Robinson, wife of Thomas Robinson", or "Jane Robinson, widow of Thomas Robinson". If the payee's name is given merely as "Mrs Robinson", she should indorse with her usual signature, "J. Robinson", or "Jane Robinson", although the latter is preferable. A cheque drawn payable to a married woman or a widow in her maiden name should be indorsed with her usual signature, words being added to indicate that the name has been changed by marriage. Thus, if Mrs Jane Robinson was originally Miss Jane Brown, she should indorse a cheque made out in the latter name as follows:—

Jane Robinson (née Brown).

#### Examples of Correct Indorsements by Married Women.

PAYER.	FORM OF INDORSEMENT.
Thomas Robinson	Jane Robinson, wife of Thomas Robinson. Jane Robinson, widow of Thomas Robinson, deceased. Jane Robinson (Mrs Thomas Robinson).
T. Robinson.	Jane Robinson, wife of T. Robinson, or Jane Robinson (Mrs T. Robinson), etc.
Robinson.	Jane Robinson, or (Mrs) Jane Robinson.
Capt. Robinson.	Jane Robinson, wife of Capt. Robinson.
Jane Taylor (now married).	Jane Robinson (née Taylor), or Jane Robinson, formerly Jane Taylor.

#### Examples of Incorrect Indorsements by Married Women.

PAYER.	FORM OF INDORSEMENT.	IRREGULARITY.
Thomas Robinson.	Jane Robinson.	Should indicate that she is the wife or widow of Thomas Robinson.
"	Mrs Jane Robinson.	Courtesy title should be omitted.
"	Mrs Thomas Robinson.	Not Mrs Robinson's signature.
Robinson.	Mrs J. Robinson.	Courtesy title should be omitted.
Jane Taylor (now married).	Jane Robinson, née Jane Taylor.	Née is, for obvious reasons, correctly applied to the surname only.

### Indorsements of Joint Payees.

Cheques payable to two or more distinct payees should be indorsed by each of the payees individually, unless one has authority to sign on behalf of all, or the payees are in partnership and the indorsement clearly indicates that it is the signature of a partner on behalf of the firm. Thus, a cheque payable to "Mr Thomas Robinson and Mr James Brown", or "Messrs Thomas

Robinson and James Brown", or "Thomas Robinson, Esq. and James Brown, Esq.", should be indorsed by both payees, and if the signatures have obviously been written by the same hand, the indorsement should be returned for confirmation, unless the banker has knowledge that one payee can sign for both, or unless one payee has died, and satisfactory evidence of the death is produced, in which case the proceeds of the cheque belong to the survivor.

If the joint payees are executors or administrators the signature of one on behalf of all may be accepted if it is clearly stated in the indorsement that the executor is so signing. But this rule should not be applied to trustees. (See below.)

If a cheque is payable to "Thomas Robinson and another", it should be indorsed "For self and James Brown, Thomas Robinson", or "For self and another, Thomas Robinson", but any other variants should be not accepted without confirmation, as, for example, the signature "Thomas Robinson" alone, or the signature "Thomas Robinson" with another signature in a different handwriting.

#### Examples of Correct Indorsements by Joint Payees.

PAYEES.	FORM OF INDORSEMENT.
Messrs Thomas Robinson and James Brown.	Thomas Robinson, James Brown (in different handwritings).
Messrs Robinson and Brown.	For self and Thomas Robinson, James Brown (if duly authorised to sign). Robinson & Brown (if a firm, and name signed by one of the partners—see below).
Mr Thomas Robinson and Mrs Jane Robinson.	{ Thomas Robinson. Jane Robinson. For self and Mrs Robinson, Thomas Robinson (authority may be presumed in this case).

#### Examples of Incorrect Indorsements by Joint Payees.

PAYEES.	FORM OF INDORSEMENT.	IRREGULARITY.
Messrs Thomas Robinson & James Brown.	Thomas Robinson { in same James Brown    } handwriting.  Robinson & Brown.	Both should sign independently, unless one can sign with authority (see above). Two distinct signatures required, or an authorised signature on behalf of both.
Mr Thomas Robinson and Mrs Jane Robinson.	T. & J. Robinson.	do.           do.

#### Indorsements of Agents.

In accordance with Section 91 of the Bills of Exchange Act, to which we have previously referred (see page 287), it is sufficient if the signature requisite for an indorsement is written by some person acting by or under the authority of the payee or indorsee; but, in order that the principal and not the agent shall be bound, it is imperative that the signature shall unmistakably indicate that the agent is signing on behalf of a named principal.



In accordance with the general rules of law relative to agents discussed in Chapter 7, any person with or without power to contract may serve as an agent to sign on behalf of another, a "person" for this purpose including such types of legal entity as the joint-stock company and partnership.

As will be explained later, it is important from the point of view of a banker that all such signatures shall be correct in form, and although a *paying* banker is not required to see that the indorsement by an agent is actually written under authority, a *collecting* banker may be unable to disclaim liability for negligence if he does not satisfy himself that indorsements by agents have been properly authorised and are within the strict limits of any existing authority.

As a rule, agents in this country sign on behalf of their principals by means of a *per procuration* signature in accordance with Section 25 of the Act (see page 224), and in such cases the indorsement should appear in the following form, where Thomas Robinson is the principal and James Brown the agent :—

*per pro.* Thomas Robinson,                                  or                                  *p.p.* Thomas Robinson,  
                                James Brown.    James Brown.

In this country *per procuration* signatures in which the abbreviation "per pro.", or "p.p.", does not precede the name of the principal are not accepted without confirmation, but the form "James Brown, *per pro.* Thomas Robinson", would appear to be legally valid, although by no means customary. Thus, in the foregoing example, a signature in the form "Thomas Robinson, *per pro.* James Brown", would not be accepted.

In the case of a *per procuration* signature, the inclusion of the abbreviation "per pro." or "p.p." is in itself a sufficient indication of the authority of the agent, but the words "for", "per", or "pro" are not in themselves so indicative, and should not be accepted unless the signature of the agent is accompanied by a word or words specifying his capacity.

It is frequently found in practice that *per procuration* indorsements are signed by persons who have no actual or implied authority, and that such indorsements are accepted by bankers. As a general rule, no liability is incurred in such cases if a cashier asks a wife to discharge a cheque payable to her husband, or a son paying in cheques to his father's account to discharge the articles on behalf of the father, but there is a considerable risk in the practice.

It should be remembered that a *per pro.* signature is only *prima facie* evidence of the existence of a proper authority to sign, so that a collecting banker is always put on inquiry by such a signature, and will lose the protection afforded to him by the Bills of Exchange Act if he accepts an indorsement in this form without verification, and it subsequently turns out that the signature is forged or unauthorised, or the cheque is being wrongly dealt with. The paying banker is not, however, required to satisfy him-

self regarding the authority for a per pro. signature if the indorsement purports to be in order. But a paying banker should always demand confirmation of the authority to sign in the case where a per pro. signature is written on behalf of a company or local authority, and no indication is given of the status of the agent signing. And even where such an indication is given, a per pro. signature should not be accepted if the status of the person signing is not such as would warrant the banker reasonably assuming that he has authority to sign. Thus a cheque indorsed "per pro." by a Secretary or Director on behalf of a joint-stock company may be regarded as in order by the paying banker, whereas confirmation should be required if the person signing describes himself as an accountant, cashier, or clerk, for such persons are not usually authorised to sign on behalf of their companies.

In the absence of a per pro. signature, agents usually sign in one of the following forms :—

For Thomas Robinson,  
James Brown,  
Agent (or Secretary or Manager).

Thomas Robinson,  
per James Brown,  
Agent.

Thomas Robinson,  
by his Attorney, James Brown.

Thomas Robinson,  
by James Brown, Attorney.

Indorsements in any of these forms are satisfactory as explicitly indicating the authority of the signers, but confirmation should be required if the status of the signer is not given, as, for example, in such forms as "Thomas Robinson, by (or per) James Brown", or "For Thomas Robinson, James Brown". In such cases there is nothing to indicate the authority of the person signing, and a paying banker is quite justified in demanding a confirmation of the indorsement or an addition of words specifying the capacity of the signer.

In connection with indorsements by agents, the case of *Stewart v. Westminster Bank*, 1926, is of some importance, for it was there distinctly laid down by the Court that a signature "*For and on behalf of*" a limited company was not a *per pro. signature* within the meaning of Section 25 of the Bills of Exchange Act. In this case a director paid into his private account cheques signed as follows :—

" For and on behalf of Alexander Stewart & Son, Ltd.,  
J. Stewart,  
Director."

It was held that this was not a per pro. signature which put the collecting banker on inquiry; but it should be distinctly understood that the case was not decided on the question as to whether there was negligence within the meaning of Section 82. (See Chapter 15.)

As has been previously explained, the mere addition to the agent's signature of words describing him as an agent will not make the indorsement that of the principal and exclude the

agent's personal liability. The principal must be *named*, and the signature must clearly indicate that it is on his behalf. Thus, in the case of a cheque payable to "Thomas Robinson", an indorsement in the form of "James Brown, agent to Thomas Robinson", would not be accepted because the signature is strictly that of James Brown, with the mere addition of descriptive words, and cannot therefore be regarded as binding on the principal.

In the case of all indorsements by agents, the signature of the agent himself must be his full signature in its usual form in accordance with the conditions already referred to as governing indorsements generally, i.e., his surname and christian name or initials must appear, but words of title or courtesy must be omitted unless they are merely descriptive. The initials of the agent with the principal's name are not sufficient. Thus, an indorsement in the form "per pro. Thomas Robinson, *Capt.* James Brown", would be returned as irregular, although a paying banker would accept as correct "per pro. Thomas Robinson, James Brown, *Capt.*". Titles or words of courtesy may, however, appear in such cases in connection with the name of the principal, because he is not regarded as signing his usual form of signature, and accordingly such indorsements as the following would be accepted :

per pro *Mr* Thomas Robinson,  
James Brown.

per pro *Capt.* Thomas Robinson,  
James Brown.

In accordance with the general rule regarding the powers of agents, an agent cannot usually delegate his authority to sign on behalf of another, so that any indorsements which indicate such a delegation should be returned for confirmation or for the signature of the agent himself. This is made clear in the following examples :—

#### Examples of Correct Indorsements by Agents.

(Signed on behalf of Thomas Robinson.)

per pro. Thomas Robinson,  
James Brown.

per pro. *Mr* Thomas Robinson,  
James Brown.

James Brown,

per pro. *Capt.* Thomas Robinson,  
James Brown.

per pro. Thomas Robinson.

Thomas Robinson,  
per (or by) James Brown, Attorney.

For (or per) Thomas Robinson,  
James Brown, Agent.

per pro. Thomas Robinson,  
James Brown & Co.

Thomas Robinson,  
by (or per) his Attorney, James Brown.

per pro. Thomas Robinson, Esq.,  
James Brown.

per pro. T. Robinson,  
James Brown,  
*Sans recourse.*

#### Examples of Incorrect Indorsements by Agents.

(Signed on behalf of Thomas Robinson.)

##### FORM OF INDORSEMENT.

per (or pro) Thomas Robinson,  
James Brown.  
Thomas Robinson,  
per (or by) James Brown.

##### IRREGULARITY.

"For" or "pro" is no indication of authority. "Agent" or some such word should be added.  
"Per" or "by" is no indication of authority. Word or words indicating capacity required.

FORM OF INDORSEMENT.	IRREGULARITY.
Thomas Robinson, per pro. James Brown.	"Per pro." must precede the principal's name.
James Brown, For (or pro) Thomas Robinson.	Agent's signature only, as the additional words are in descriptive.
James Brown, Agent (or Attorney) for Thomas Robinson.	" " " " "
Per pro. (or for) Thomas Robinson, James Brown, per (or by) William Brown.	Delegation of authority not permissible.
Per pro. Thomas Robinson, J. B.	Signature of agent required, and not merely initials.
Per pro. Thomas Robinson, Brown.	Agent's full signature required.

### Indorsements of Executors and Administrators.

As executors have implied power to delegate their authority to one (or some) of their number (see Chapter 7), no objection can be raised to the indorsement of cheques by one executor, provided he clearly indicates *that he is an executor*, and that he signs on behalf of himself and his co-executors. The fact that a person signs for himself and his *co-executors* is, of course, clearly indicative that he is an executor, even though his signature is not followed by the designation "Executor". Although authority to sign may be delegated by several executors to one of their number, they have no power to place such authority in the hands of any *outside* person, and accordingly indorsements which are otherwise in order should be refused if the person signing does not indicate that he is an executor.

Cheques payable to a deceased person should be indorsed by his executors in the recognised way, and if so discharged should be paid by a banker without question unless he has reason to doubt the authority of the persons signing, in which case he should ask for production of the probate or for confirmation by the presenting banker. If a will exists the executors are the only persons entitled to deal with cheques or other property of the deceased, but in the absence of a will, power to deal with the property of the deceased is vested in an administrator or administrators appointed by the Court, whose powers of signing and indorsing are similar to those of executors as here defined. Signatures in discharge of cheques payable to a deceased by any person or persons other than such personal representatives should not be accepted by a banker, otherwise he may render himself liable to refund any moneys wrongly dealt with to the persons empowered to deal with the estate. For this reason, the signature of a widow or son should not be accepted in indorsement of a cheque payable to a deceased, unless such individual is the personal representative of the deceased.

**Examples of Correct Indorsements by Executors and Administrators.**

(Signed on behalf of Thomas Robinson, deceased)

For self and { Co-executor(s)  
or  
Co-administrator(s) } of Thomas Robinson, deceased,  
James Brown.

For self and { Co-executor(s)  
or  
Co-administrator(s) } of the late Thomas Robinson,  
James Brown.

For the Executors of the late Thomas Robinson,  
James Brown,  
Executor.

Per pro. the { Executors  
or  
Administrators } of Thomas Robinson deceased,  
James Brown, Executor.

James Brown, { Joint Executors  
or  
Administrators } of Thomas Robinson, deceased.  
William Brown,

James Brown, sole { Executor  
or  
Administrator } of Thomas Robinson, deceased.

Jane Robinson, sole { Administratrix  
or  
Executrix } of Thomas Robinson, deceased.

James Brown,  
Sole Executor of Thomas Robinson, deceased.  
(Without recourse to me.)

**Examples of Incorrect Indorsements by Executors.**

**FORM OF INDORSEMENT.**

- executors of Thomas Robinson, deceased,  
James Brown.
- self and Co-executors,  
James Brown.
- pro. Executors of Thomas Robinson,  
James Brown.
- pro. Thomas Robinson, deceased,  
James Brown, Executor.

**IRREGULARITY.**

- Signature does not indicate that *Brown* is an executor signing for *all* the executors. Indorsement must specify name of deceased.
- Capacity of the signer as executor must be indicated.
- Signer cannot sign as agent of a deceased person.

Cheques made payable to the executors or administrators of a deceased person require signing in accordance with the foregoing general rules, and if one person signs for all the representatives he should clearly indicate his capacity to discharge the instrument. Thus a cheque payable to the "Personal Representatives of Thomas Robinson, deceased", may be indorsed in any of the correct forms given above.

**Indorsements by Trustees.**

So far as their signing powers are concerned, trustees differ from executors in the important respect that, if there are more than one, they cannot ordinarily delegate their authority to an outside person or persons, or to one or some of their number. As a rule, trustees must act *personally* in regard to all matters connected with the trust, and if there is more than one, they must all act *jointly*.

Accordingly, if there is anything on the face of a cheque to indicate that it is payable to trustees, it must be indorsed in such a way as clearly to show that all the trustees have joined in the discharge, otherwise the indorsement should be returned for confirmation. If the cheque is payable to a person whose estate is vested in the hands of trustees, the latter should indorse the instrument and indicate clearly that they sign as trustees of the payee concerned.

**Examples of Correct Indorsements by Trustees**  
(of Thomas Robinson, deceased).

PAYEE.	FORM OF INDORSEMENT.
Trustees of the late Thomas Robinson.	James Brown } Trustees of Thomas Robinson
Trustees of Thomas Robinson, deceased.	William Brown } deceased.
James Brown and William Brown, Trustees of the late Thomas Robinson.	James Brown } Trustees of the late Thom
Trustees of Thomas Robinson, deceased.	William Brown } Robinson.
	James Brown,
	Sole trustee of Thomas Robinson, deceased.

**Examples of Incorrect Indorsements by Trustees.**

FORM OF INDORSEMENT.	IRREGULARITY.
For self and Co-trustees of Thomas Robinson, deceased, James Brown.	One trustee cannot, as a rule, sign on behalf of all.
Per pro. Trustees of Thomas Robinson, deceased, James Brown.	" " " "
James Brown } (On cheque payable to Trustees William Brown } of the late Thomas Robinson.)	Signers must indicate that they are the trustee of Thomas Robinson.
James Brown, Trustee of Thomas Robinson, deceased.	Designation should be "sole trustee", or the signature or signatures of remaining trustee or trustees should be added.
Per pro. (or for) Thomas Robinson, James Brown, Trustee (on cheque payable to Thomas Robinson, deceased).	Trustee cannot sign as agent of a deceased person.

**Indorsements on behalf of Partnerships.**

It will be remembered that any partner in a *trading* firm has implied power to bind the firm by signing its name on negotiable instruments, with or without the addition of his own name or of words indicating his authority. It follows, therefore, that, when in such cases the partner's name is omitted, there is, as a rule, nothing to guide the banker as to whether the signature was or was not written by a partner, and his only safeguard is to ensure that the indorsement strictly conforms to the name of the payee on the face of the cheque, or, where there is a recognised practice in regard to any special form of indorsement, that that practice is rigidly adhered to.

The necessity for seeing that the name of the firm in an indorsement corresponds exactly with that given on the face of the cheque arises from the fact that the names of firms are often so much alike as to cause confusion or to give rise to fraud. On the other hand, if a firm's name is wrongly given, a partner of

the firm is entitled, like any other indorser, to sign the wrong name, adding the correct name if he thinks fit.

These points are made clear by the following examples :—

**Examples of Correct Indorsements on behalf of Partnerships.**

PAYER.	FORM OF INDORSEMENT.
ms Robinson & Co.	Robinson & Co. Per pro. Robinson & Co., Thomas Robinson.
ms Thomas Robinson & Co.	Thomas Robinson & Company. Thomas Robinson & Co. For Thomas Robinson & Company, Thomas Robinson, Partner.
ms Robinson, or ms Robinsons.	Robinson and Robinson. Thomas & Jane Robinson. Robinson & Son. Thomas & William Robinson. Thomas Robinson & Son. Robinson Bros. Robinsons. T. Robinson; Jane Robinson.
ms Robinson Bros.	Robinson Bros. Per pro. Robinson Bros., Thomas Robinson.
ms Robinson & Brown.	Robinson & Brown Per pro. Robinson & Brown, Thomas Robinson. Thomas Robinson } For Robinson & Brown, James Brown } Thomas Robinson, Principal.

**Examples of Incorrect Indorsements on behalf of Partnerships.**

PAYER.	FORM OF INDORSEMENT.	IRREGULARITY.
ms Robinson & Co.	T. Robinson & Co. Robinson & Brown.	Name differs, and may be that of another firm.
ms Thomas Robinson & Co.	Robinson & Co. T. Robinson & Co., James Brown.	The signature should indicate the authority of the signer, as, for example, by the addition of the word "partner".
ms Robinson.	Robinson & Co. T. Robinson & Co.	Payee's name suggests two or more persons of the name Robinson, whereas a firm may include persons not so named.
Robinson Bros.	T. & J. Robinson. / T. Robinson. \ J. Robinson. Per pro. T. & J. Robinson, T. Robinson. T. Robinson & Bros.	Signatures do not indicate that the persons included in the names are brothers.
		Firm name differs.

**Indorsements on behalf of Joint-Stock Companies.**

By virtue of Section 77 of the *Companies (Consolidation) Act, 1908* (see page 149), an indorsement is made on behalf of a joint-stock company when it is made in the name of the company, or made by or on behalf of or on account of the company by a person acting under its authority.

It follows from this provision that the mere writing or impressing of the name of a company by some one acting under its authority constitutes a valid indorsement, but although bankers will accept the mere signing of the name of a partnership as a

good discharge, they will not in practice accept without confirmation an indorsement or signature on behalf of a joint-stock company, unless the authority and capacity of the signer are clearly indicated. Moreover, although officials in a variety of positions appear to think that they are at liberty to indorse on behalf of the company by which they are employed, bankers will not, as a rule, accept such indorsements unless they are made by persons who are usually in a position to bind the company, as, for example, directors, managers, secretaries, or, in the case of a company which is being wound up, the liquidator. Indorsements by subordinate officials, such as cashiers, accountants, ledger clerks, or private secretaries should not be accepted without confirmation. It is to be remembered, also, that officials who have express authority to sign on behalf of a company, have no right to delegate that power to others; accordingly indorsements which bear evidence of such a delegation should be returned for confirmation or authorised signature.

As in the case of all other discharges, an indorsement on behalf of a company should correspond exactly with the name of the company as given on the face of the instrument or in the special indorsement, but if the name so given is inaccurate or incomplete, the indorser should sign in the incorrect form, adding the company's correct description underneath. The term "limited" should, of course, appear in the final indorsement, whether or not it is given on the face of the cheque, for this word must not be omitted in any signature on behalf of a registered company.

**Examples of Correct Indorsements on behalf of a Joint Stock Company.**

PAYEE.	FORM OF INDORSEMENT.
The Acme Cycle Co., Ltd.	Per pro. The Acme Cycle Co., Ltd. or { For the Acme Cycle Co., Ltd. or { For and on behalf of the Acme Cycle Co., Ltd. or { The Acme Cycle Co., Ltd., John Brown, { Director. or { Secretary. or { Manager.
Do.	The Acme Cycle Co., Ltd., per John Brown, { Director. or { Secretary. or { Manager.
Do.	The Acme Cycle Co., Ltd. (in Liquidation.) John Brown, Sole Liquidator.
Do.	The Acme Cycle Co., Ltd., John Brown & Co., London Agents.
Thomas Robinson & Co., Ltd. (Company's name : T. Robinson & Co., Ltd.)	For and on behalf of : Thomas Robinson & Co., Ltd., T. Robinson & Co., Ltd., James Brown, { Director. or { Secretary. or { Manager.



**Examples of Unacceptable Indorsements on behalf of a Joint-Stock Company.**

PAYER.	FORM OF INDORSEMENT.	IRREGULARITY.
Acme Cycle Co., Ltd.	Per pro. The Acme Cycle Co., Ltd. James Brown, Cashier, or { Accountant. or { Clerk.	Authority of signer not usually regarded as sufficient without confirmation.
	For Acme Cycle Co., Ltd., per pro. John Brown, Director. H. Smith, Private Secretary.	Delegation of authority to sign is not accepted without confirmation.
	For Acme Cycle Co., Ltd. H. Smith, pro / Secretary. or { Director.	" "
	The Acme Cycle Co., Ltd. Per pro. Acme Cycle Co., John Brown, Director. or { Secretary.	Quite legal, but usually returned for confirmation. The word "limited" is essential and must appear.
	John Brown, Director, The Acme Cycle Co., Ltd.	Merely the signature of the director, with a description of himself added.
Thomas Robinson & Co., Ltd.	For T. Robinson & Co., Ltd., John Brown, Director.	Name of Company does not agree.

**Indorsements of Official and Fiduciary Payees.**

The name of the payee on the face of a cheque is sometimes followed by a word or words describing an official or fiduciary position, thus indicating that the money is being paid to the person named in his official or fiduciary capacity. In such cases the indorsement of the payee must be followed by a description corresponding to that on the face of the cheque. Thus, cheques drawn in favour of "Thomas Robinson, Executor", or "Thomas Robinson, trustee of James Brown", should not be paid unless the indorsement includes the descriptions given, for the mere signature "Thomas Robinson" is not a sufficient indication that the money has reached the proper hands. Similarly, cheques payable to "William Brown, Treasurer of Northtown U.D.C.", or to "James Brown and Thomas Robinson, Overseers of the Parish of St Michaels", should consist of the signatures of the persons named followed by descriptions corresponding to those given.

Again, if a cheque is made payable to the holder or holders of an office for the time being without actually specifying the name or names of the individuals, as, for example to "The Treasurer, Northtown U.D.C." or to "The Overseers of the Parish of St Michaels", the indorsement must include, not only the signatures of the persons holding the positions, but also the description as given. On the other hand, the fact that the

payee of a cheque *happens* to hold an official or fiduciary position does not make it necessary for him to sign in that capacity if the cheque is made payable to him personally, even though the money is intended by the drawer to be paid for official or fiduciary purposes. The indorser may, if he wishes, add a description of his capacity, but the addition of such words should not be such as to make it necessary for the banker to demand confirmation of the signature. An example of this kind is given in *Questions on Banking Practice*, No. 921, where a cheque payable to "A. M. Chambers, Esq." is indorsed "A. M. Chambers, for self and Co-trustees of the late Arthur Chambers". Apart from the fact that such an indorsement is that of a cheque payable to "the trustees of A. Chambers", the paying banker could not ignore the fact that one trustee cannot, as a rule, sign on behalf of all, and confirmation must therefore be demanded.

These points are further explained by the following examples :—

#### Examples of Correct Indorsements of Official or Fiduciary Payees.

PAYEE.	FORM OF INDORSEMENT.
Thomas Robinson, Treasurer, Northtown U.D.C. The Treasurer, Northtown U.D.C.	Thomas Robinson, Treasurer, Northtown U.D.C.
Thomas Robinson and James Brown, Overseers of St Michaels.	Thomas Robinson } James Brown } Overseers of St Michaels. (Two handwritings.)
The Overseers of St Michaels.	For the Overseers of St Michaels, James Brown, Assistant Overseer.
Thomas Robinson, Trustee, (or Executor, etc.) Northtown U.D.C.	Thomas Robinson, Trustee (or Executor, etc.)
The Mayor of Northtown.	For Northtown U.D.C., Thomas Robinson, Treasurer.
The Collector of Taxes.	Thomas Robinson, Mayor of Northtown. Thomas Robinson, Collector of Taxes.

#### Examples of Incorrect Indorsements of Official or Fiduciary Payees.

PAYEE.	FORM OF INDORSEMENT.	IRREGULARITY.
Thomas Robinson, Treasurer, Northtown U.D.C.	Thomas Robinson.	Requires official description.
Treasurer, Northtown U.D.C. Do. do. do.	Thomas Robinson, Treasurer, Northtown U.D.C.	" " Requires signature of the official.
Overseers of Northtown	Thomas Robinson, } James Brown, } (different handwritings).	Requires official description.
Thomas Robinson, Trustee. Northtown U.D.C.	Thomas Robinson, For Northtown U.D.C., James Martin, Collector.	Requires fiduciary description. Requires confirmation or signature by an authorised official. A rat collector is not regarded as being so authorised.
A. M. Chambers.	A. M. Chambers, for self and co-trustee of the late A. Chambers.	Indorsement is not that of A.M Chambers, but purports to be that of the trustees of the late A Chambers, one of whom cannot sign for all.

PAYEE.	FORM OF INDORSEMENT.	IRREGULARITY.
ector of Taxes.	Per pro. Thomas Robinson, Collector of Taxes, James Brown.	Should be confirmed, as authority to discharge cannot be delegated.
mas Robinson, A/c. A.B.	Thomas Robinson.	"A/c. A.B." should be added as an indication that the funds are correctly dealt with.

### Indorsements by Mark.

Cheques or bills made payable to persons unable to write should be indorsed by the "mark" of the payee, properly authenticated in the manner referred to on page 249 in connection with the drawing of cheques. The authentication of the mark should be in the recognised form as indicated below, and the witness, who should be an independent party known to the illiterate payee and to the banker collecting or paying the cheque or bill, should clearly state his name, occupation, and address under or alongside the word "witness". This precise formality, and the full particulars of the witness are necessary in case of any difficulty, when the collecting or paying banker may have to call upon the witness to prove the identity of the signer.

His	Witness :
John X Smith.	James Brown, Grocer,
mark.	17, High Street, Northtown.

The paying banker should demand confirmation of the discharge in the case of any material departure or omission from this recognised form, and a similar procedure should be adopted in cases where a reasonable doubt exists as to the validity of the discharge. For instance, the form "x Jane Smith, her mark, in the presence of J. Jones, High Street, Northtown" should not be accepted, as it does not clearly indicate that "J. Jones" signs as a witness. (See *Q. B. P.*, No. 959.)

### Indorsements of Impersonal, Non-existing, and Fictitious Payees.

This matter has been referred to previously on page 252, where it was pointed out that bankers sometimes rely on the provisions of Section 7 (3) of the Bills of Exchange Act, 1882, to treat as payable to bearer cheques which are clearly intended to be exchanged into cash, as, for example, cheques drawn payable to "Housekeeping or order", "Wages or order", "National Health Insurance Stamps or order", "Cash or order", etc. It is, however, doubtful as to whether the Section refers to cases of this kind, and although it seems reasonable to treat such cheques as payable to bearer on the ground that they are not capable of indorsement, since no person is indicated who can

give a discharge for the payment, bankers are justified in refusing to pay cheques so drawn unless they are indorsed by the drawer or cashed by him or his known agent. If payment of such cheques is refused, the answer "Irregularly drawn" should be clearly written on the face of the cheque, but a banker who has been accustomed to treat such cheques as payable to bearer would run considerable risk of liability to his customer if he refused to cash them without giving reasonable notice of his intention.

The practice of regarding such cheques as payable to bearer should not, however, be extended more than is absolutely necessary, and in no circumstances should it be applied to cheques drawn with the obvious intention that the money shall pass into public or local taxation accounts. In all such cases the discharge of a recognised official should be obtained. Thus, a cheque payable to "Income Tax or order" should be discharged by the Collector of Inland Revenue, a cheque to "Borough Rates or order" discharged by the Borough Treasurer, and so on.

Similarly, the drawer's indorsement should be required on cheques payable to a specified account, presumably in his own name, as for example on cheques to "Farm Account or order", or to "Deposit Account No. 2 or order". (See *Q. B. P.*, No. 717.)

As has been stated previously, it is usually a question of fact to be determined by the circumstances of each case as to what constitutes a "non-existing or fictitious person", but it is to be presumed that cheques may be regarded as being payable to bearer if drawn, for example, to "Robinson Crusoe or order", or to "Queen Anne or order", or "Father Neptune or order". (See also Chapter 11.)

### Indorsements of Anomalous Payees and of Cheques Irregularly Drawn.

Customers are frequently so careless in completing the particulars on the face of cheques that it is difficult for the banker to determine precisely what is intended by the drawer, but, as already pointed out, it is nevertheless important for a collecting banker to see that indorsements on cheques collected by him are in order, and for a paying banker to obtain a complete and regular discharge in the interests of both himself and the drawer. Innumerable examples could be given in illustration of these points, but the following list should serve to indicate the procedure in the cases most frequently met with in practice:—

HOW DRAWN.	COMMENTS.
Bearer or order.	No indorsement necessary, as instrument is payable to bearer.
Bearer (Mrs Robinson) or order, T. E. Robinson."	Mrs Robinson's discharge should be obtained.
Bearer (my wife) or order, T. E. Robinson.	" " " "

HOW DRAWN.	COMMENTS.
Bearer or order.	Cheque should be returned as irregularly drawn, since a payee should be specified.
Thomas Robinson <del>or Bearer</del> .	Requires the indorsement of Thomas Robinson.
Thomas Robinson <del>or Order</del> (followed by drawer's initials).	Usually paid without indorsement as a bearer cheque, although some bankers would return cheque marked "Requires payee's indorsement or completion of alteration".
Thomas Robinson only...	Should be indorsed by Thomas Robinson, and the signature confirmed by the collecting banker, unless the cheque is presented in person, when identification of the payee should be insisted upon.
Thomas Robinson...	Such a cheque is regarded as payable to order, and should be indorsed by the payee.
Thomas Robinson, or order of James Brown.	Either persons named may give an effective discharge.
If or Order, Thomas Robinson.	Requires indorsement unless presented in person by the drawer for encashment. In such a case indorsement by an agent should not be accepted.
/o. Thomas Robinson or order.	Requires the indorsement of Thomas Robinson, or "Placed to the credit of payee's account with us", followed by the signature of the payee's banker.
Thomas Robinson in full settlement.	Should be indorsed in the same terms. An indorsement, "Thomas Robinson in part payment", should be returned as irregular.
Pay to the order of the R.S.I. Insurance Company or Bearer.	The company's indorsement should be required.
Pay bill attached or Bearer.	Cheque payable to bearer, but should not be paid unless the bill referred to is handed over in return for the payment.
Thomas Robinson or Bearer, indorsed Pay to the order of James Brown, Thomas Robinson.	No indorsement required, as cheque is originally payable to bearer, and special indorsement does not make it payable to order.

### Answers on Cheques returned on Technical Grounds.

It is very important that the answers on all cheques returned by the paying banker for technical reasons should state these reasons clearly and unmistakably, so that the collecting banker or person to whom the cheque is returned may have no difficulty in putting matters right, and so that the credit of the drawer may not be affected by the non-payment of the instrument. Answers on returned cheques are usually written in the left-hand top corner.

If objection is raised to the manner in which the cheque is drawn, the answer should be "Cheque Irregularly Drawn", "Requires Payee's name", etc., the words "Will pay on completion" or "Will pay on drawer's confirmation" being sometimes added to protect the drawer's interests.

If the indorsement of the payee has been omitted the usual answer is "Payee's indorsement required" or simply "E. R.", but if the missing indorsement is one which should follow a special indorsement, then the omission should be clearly indicated in the answer by some such words as "Requires third indorsement", or "Indorsement of Thomas Robinson required". Particular

care is necessary to ensure that such indorsements are properly completed, for a variety of forms are used by indorsers in making cheques payable to special indorseees. The usual form is "Pay to James Brown or order, Thomas Robinson", but the same intention is evidenced, and the indorsee's signature should be obtained, in respect of such forms as "Transfer to James Brown, Thomas Robinson", "Thomas Robinson in favour of James Brown", or "Thomas Robinson to the order of James Brown".

Sometimes when a cheque is not indorsed by the payee, a collecting banker will obviate the need for obtaining the payee's discharge by indorsing the cheque in the following terms:—

"Placed to the credit of payee's account with us,  
per pro. The Northern Bank, Ltd.,  
James Brown, Manager."

As a rule, such a discharge is accepted by bankers in this country, rather in order to save trouble than for any other reason. Nevertheless, the method is open to some danger, for the paying banker may be held liable by his customer for having paid out funds without the signature of the payee, although he would no doubt be indemnified by the collecting banker in respect of any loss which might arise. On the other hand, the collecting banker may in fact be authorised to indorse cheques in this way on behalf of a customer, as, for example, when the latter is travelling abroad, but in such a case the best form of discharge is:—

"Indorsed on behalf of and under the authority of Thomas  
Robinson,  
per pro. the Northern Bank, Ltd.,  
James Brown, Manager."

If an indorsement is irregular or for any reason unacceptable, the usual answers are "Indorsement irregular", "E/I", or "Indorsement requires Banker's Confirmation". The latter form is used, for example, in the case of indorsements by agents who do not indicate their authority, or when a banker wishes a signature to be verified as that of the payee or indorsee.

The majority of indorsements which are refused on account of irregularity or unacceptability are confirmed by the collecting-banker, who writes on the back of the instrument the words "Indorsement confirmed", and adds his signature as an indication that he vouches for the authenticity of the discharge to which exception is taken. The banker so signing will thereafter be liable to indemnify the paying banker if the indorsement turns out to be other than what it purports to be.

The phrase "Indorsement confirmed", followed by the banker's signature, is to be preferred to "Indorsement guaranteed", for in the other case the signature may be regarded as a guarantee requiring a 6d. stamp.

**Indorsements on Dividend and Interest Warrants.**

This matter is dealt with hereafter in Chapter 19.

**Indorsements in Foreign Languages.**

An indorsement in a foreign language should not be accepted unless the banker is satisfied as to its correctness and completeness. As a rule, no difficulty is experienced in dealing with indorsements in a European language, but care is needed in connection with indorsements *in oriental characters*. These should not be accepted without confirmation unless the banker has reason to be satisfied as to their correctness. Such indorsements are sometimes accompanied by a translation, but the translation should not be regarded as correct unless it is certified by a notary or confirmed by a banker. The Council of the Institute of Bankers suggest that if such indorsements are not accepted, the answer given by the paying banker should be—

“*Fourth* (etc.) indorsement requires notarially certified translation, or will pay on banker’s confirmation”.

## CHAPTER 14

### THE PAYMENT OF A CUSTOMER'S CHEQUES AND BILLS

THE primary function and duty of a banker in this country is to honour the cheques of his customer, for the leading constituent of the contractual relationship between a banker and his customer is the implied obligation of the former to honour the signature of his customer to orders for the payment of funds out of his account. This legal obligation implies that a banker who refuses or neglects to act upon the mandate of his customer, properly given, may render himself liable for breach of the contract with his customer. Moreover, the banker may have to pay substantial damages for injury to the customer's credit and reputation if such injury can be clearly proved, as it may be, for example, in the case of a person whose business is injured by reason of the dishonour of his cheques without reasonable justification.

This general obligation of the banker to honour the cheques of his customer is, however, subject to a number of important provisos. In the first place, the customer must have an account upon which the banker usually allows cheques to be drawn, i.e., a current or drawing account. Secondly, the cheques must be signed by the customer and drawn in legal form. Thirdly, the state of the customer's account must warrant the payment, i.e., he must either have sufficient funds to his credit in the hands of the banker or there must be an arrangement for an overdraft to an agreed limit. Fourthly, there must be no legal reason or excuse for refusing the payment, and finally, the cheque must be presented by the holder or his authorised agent during recognised business hours at the branch where the customer's account is kept. Each of these points is discussed at length in

the following paragraphs.

The payment of bills as distinct from cheques is dealt with at the end of this chapter, but it may here be noted that the legal obligation of a banker to pay cheques does not extend to bills of exchange accepted by a customer payable at the branch, although a banker who had paid such bills without question for a long period could not suddenly refuse to do so without first giving reasonable notice of his intention to the customer. Any such departure from an established course of dealing can be made only by giving reasonable notice, otherwise the banker



may render himself liable to an action for damages in respect of injury to his customer's credit.

### The Right to Draw Cheques.

It will be remembered that a customer was defined as any person who has some sort of an account with a banker. But the mere fact that a person has an account at a bank does not give him the right to draw cheques on that bank, nor does it necessarily imply that the banker is under an obligation to honour cheques if they are drawn. Cheques need not be paid by the banker unless the customer has an account at the bank of the type upon which cheques are usually issued and paid, and which contains funds withdrawable *upon demand*.

As a general rule, cheques are paid by a banker only if they are drawn on a *current* or *drawing* account, and the existence of a credit balance on such an account always gives the customer a right to issue cheques although the matter may not have been mentioned when the account was opened. Usually, however, this principle does not apply to a *deposit* account, whether repayable on demand or after a specified notice, for apart from the question of notice, it is in such cases ordinarily stipulated that "Personal application must be made and the Deposit account book produced at the Bank when any money is withdrawn". Similarly, in the case of a Deposit Receipt, withdrawals can be made only if the receipt is produced and is signed by the owner, while the banker will not pay such a receipt to a third party, unless that party is known to be receiving payment on behalf of the owner of the receipt. In neither of these cases is there any *implied* obligation on the banker's part to honour cheques issued against funds in his hands. On the other hand, a banker would rarely refuse payment of a cheque drawn by a customer if that customer had ample funds on deposit, for even if the amount were not debited to the deposit account, the banker would be reasonably safe in granting a temporary overdraft on current account—thereafter requesting the customer to make the necessary transfer from the deposit.

Moreover, many provincial banks (particularly in the north of England) allow customers to draw cheques against deposit accounts without any previous arrangement, although in London it is not usual to permit such withdrawals. In this connection confusion sometimes arises, because in some banks the term "Deposit Account" is applied to what is really a small current account, the terms "Deposit Receipt Accounts" or "Savings Accounts" being reserved for deposits which are withdrawable only on the return of a receipt or pass book.

Generally speaking, however, the obligation of the banker is to honour cheques drawn against a *current* account, and the

discussion in the following paragraphs applies primarily to this arrangement.

### **Cheques must be Signed by the Customer.**

This implies that the cheque must be signed by the drawer himself, or on his behalf by his duly authorised agent. If the signature is forged or unauthorised the banker cannot, as a rule, debit the amount to the customer's account, for it would obviously be unreasonable that the customer's money should be paid out against a mandate which he has not issued or authorised. Only in very exceptional cases can a customer be charged with a cheque bearing a forged or unauthorised signature, as, for example, where the banker can prove to the satisfaction of the Court that the customer, by his actions, has so misled the banker as to cause him to pay a cheque which would otherwise have been refused, or if the customer has in some way induced the banker to think that the signature on a cheque is a genuine one, or if the drawer, having received notice of the forgery of his signature to a cheque, does not at once take steps to warn any innocent holder or the banker, so that the latter can refuse payment of the cheque when presented.

In any of such circumstances where the banker suffers injury or prejudice by the actions or silence of the customer, the customer is "*estopped*", or precluded, from denying that the forged signature is his signature. Thus, in the case of *M'Kenzie v. British Linen Company*, 1881, it was laid down that a person who knows that a bank is relying upon his forged signature to a bill of exchange cannot lie by and not divulge the fact until he sees that the position of the bank is altered for the worse. But this principle will not apply if the customer maintains silence in respect of a forgery at the request of the bank, as, for example, when it is desired to protect one of the bank's servants who was responsible for the forgery, nor is a customer involved in liability merely because, although he knows of a forgery, he maintains silence for a period during which the position of the bank is in no way prejudiced.

Moreover, the banker will be able to debit his customer with cheques bearing unauthorised signatures if the customer has expressly ratified the actions of his agent in so signing, or if he is estopped from denying their validity, as, for example, when he has not objected over a period to his account being debited with cheques drawn by an agent who has no authority to sign such cheques on his behalf.

It is clear that every case of this kind is a question of fact to be determined by the circumstances, but if a banker is unable to debit his customer with a cheque bearing a forged or unauthorised signature of the drawer, he is nevertheless generally entitled to a refund of the money from the person to whom it was paid. This

right is indisputable if the person who received the money held by virtue of a prior forgery or acted without good faith; but if it is merely a question of defect in the title of the holder arising from an unauthorised signature and that holder is entirely innocent, the banker cannot recover from the person receiving the payment unless the money is demanded back within a reasonable time and before the position of that person has been altered to his detriment. This might arise, for example, by the lapse of the time during which the holder is entitled to give notice of the dishonour to previous indorsers and to hold them liable for the amount of the instrument. (See also "Money paid by Mistake" at the end of this chapter.)

It is to be noted also that the paying banker cannot return a cheque bearing a forged signature of the drawer to the debit of the collecting banker after the lapse of the recognised time allowed by bankers for the return of cheques presented through the clearings (see *post*, page 346). Accordingly, if a forgery is discovered too late to return a cheque in the ordinary way, and if the customer's account cannot be debited, the loss must fall on the paying banker unless he can recover from the person who obtained the money.

It will be remembered that a cheque should not be regarded as being properly signed unless the signature corresponds with that of the customer in the banker's Signature Index; if there is any discrepancy, the cheque should be returned marked "Signature differs". In the case of cheques drawn on behalf of impersonal customers (including companies, local authorities, etc.) the signature should correspond with the instructions given to the banker in the relative mandate, otherwise the cheque should be returned with some such answer as: "Signature differs"; "Signature incomplete"; "Secretary's signature required"; or "Signature of two (as distinct from one) directors required". If, in such cases, a banker pays a cheque bearing a signature which is not in accordance with his mandate, he may be unable to debit the account by reason of having paid against an unauthorised signature.

The requisite that a cheque is to be signed by the customer implies also that any material alterations thereon must be duly initialled by the customer, for as has already been pointed out, a fraudulent material alteration to a cheque renders it void as against the drawer unless it is authorised by him, or unless it can be proved that by his negligence in drawing the cheque he has facilitated the alteration. As to what is a material alteration sufficient to void a cheque is explained in the preceding chapter. As to what is negligence on the part of the customer sufficient to preclude him from denying his mandate is a question of fact to be determined by the circumstances of each case, but it was clearly stated by the House of Lords in *London Joint Stock Bank v. Macmillan & Arthur*, 1918 (see page 239), that a customer

is bound to exercise reasonable care in drawing a cheque so as to prevent the banker from being misled, and if he draws a cheque in such a manner as to facilitate fraud, he is guilty of a breach of duty as between himself and the banker, and will be responsible for any loss suffered by the banker as a result of his negligence.

### **Cheques must be in Legal Form.**

In order to be legal a cheque must conform to the "requisites as to form" which have been discussed in Chapter 12. It must be properly stamped, it must be clear and free from ambiguity, embodying in plain, unmistakable terms the unconditional order of the customer to the banker to pay on demand a sum certain in money; it must be due for payment, i.e., not post-dated or stale, at the time of payment, and, if it is payable to order, it must purport to be properly indorsed by the payee and by subsequent indorsers.

The judgments in the famous *Macmillan* and *Joachimson* cases leave no doubt as to the banker's right to insist that cheques shall be drawn in such a manner as to enable him to fulfil his obligations without any misgiving as to what he is required by the customer to do. The paying banker is not called upon to undertake risks or liabilities which were not contemplated when the account was opened as likely to arise out of the ordinary course of business, and accordingly he is fully entitled to refuse payment of any document which can reasonably be regarded as being irregularly drawn, provided that he does so in such a manner as not to damage his customer's credit. In such a case the general answer "Irregularly drawn" appears to be the most satisfactory, but if the banker has been accustomed to pay cheques irregularly drawn without objection, he must not discontinue to do so without giving reasonable notice of his intention to the customer. Thus, a banker who has been accustomed to pay on behalf of a customer orders with a form of receipt attached, cannot suddenly refuse to do so on the ground that such documents are not cheques, or that the mandate is not unconditional. The customer must be given due warning of any such change in an established course of dealing, otherwise the banker may be liable in an action for injury to the customer's credit.

The question as to whether a cheque is to be regarded as properly stamped, and the circumstances in which a cheque is considered to be post-dated or stale, are discussed in Chapter 26 and Chapter 12 respectively.

### **Cheques must purport to be Properly Indorsed : The Protection of the Paying Banker.**

As to when a cheque is properly indorsed is a question of fact to be determined by the circumstances of each case in

accordance with the recognised principles relating to indorsements which have been considered in the preceding chapter. As is there stated, a paying banker is not concerned as to whether there are or are not indorsements on a cheque *originally* made payable to bearer, but in the case of cheques originally made payable to order, he must exercise reasonable care to ensure that the indorsements are in order and that they purport to be those of the payee or special indorsees (if any). The banker must aim at obtaining for his customer a reasonable and proper discharge for the payments made by cheque, and, in deciding in any particular case what is a reasonable and proper discharge, he must be guided by the recognised practice of bankers and by such principles concerning indorsements as have been from time to time laid down in the Courts.

But while it is only right that a paying banker should be held responsible for seeing that the indorsements on cheques are technically correct and apparently in order, it would obviously be unreasonable to expect him to accept responsibility for the *authenticity* of the signatures, for it is clearly impossible for a paying banker to know the signature of every holder through whose hands a cheque may pass in the course of its career. In order to operate as an effective discharge a cheque must be paid "in due course" in accordance with the provisions of Section 59 (1) of the Bills of Exchange Act, which reads as follows:—

59. (1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

"Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

But a person who holds a cheque or bill by or through a forged indorsement is not a "holder" (see page 214, *ante*), so the question naturally arises: What is the banker's position if he pays away his customer's money to a person who is not a holder of the cheque by reason of the fact that it bears a forged indorsement? It is obvious that, in the absence of special protection covering the point, a banker cannot claim that a cheque paid by him under a forged indorsement has been duly paid in accordance with Section 59.

Fortunately for the banking community these facts were recognised at an early stage in the development of the cheque system; and when a wide extension in the use of cheques was expected to follow the reduction to one penny of the stamp duty on such instruments by the Stamp Act, 1853, provisions were inserted in that Act with the object of protecting bankers against loss resulting from forged or unauthorised indorsements on cheques paid by them. Thus Section 19 of this Act provided that:—

19. Any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to

be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof, and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof.

A somewhat similar but less extensive protection is afforded to the paying banker by Section 60 of the Bills of Exchange Act, 1882, which reads as follows :—

60. When a bill payable to order on demand is drawn on a banker and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

On carefully considering these two sections, it will be seen that a paying banker is fully protected in respect of forged indorsements on crossed or uncrossed order cheques or drafts paid by him provided he pays *in good faith* and *in the ordinary course of business*. But whereas Section 60 of the Bills of Exchange Act applies only to bills of exchange payable on demand drawn on a banker, i.e., cheques proper as defined by Section 73 of that Act, Section 19 of the Stamp Act applies to *any document drawn on a banker* for the payment of money to order on demand, and therefore protects the banker in respect of instruments which are not strictly cheques as, for example, a banker's draft on demand drawn by one branch on another branch, or drawn by a branch on head office, or *vice versa*. As has already been pointed out in Chapter 12, such documents do not fall within the definition of a cheque because they are not addressed by one person to another, branch and head office of the same bank, or two branches of the same bank, being regarded in the eye of the law as one and the same entity.

In order to obtain the protection of Section 60, the banker must pay *in good faith* and *in the ordinary course of his business*. According to Section 90 of the Act, "A thing is deemed to be done in good faith, within the meaning of this Act, where it is, in fact, done honestly, whether it is done negligently or not". As Sir John Paget points out<sup>1</sup>, "It is difficult to conceive, still more to formulate, conditions involving absence of good faith on the part of a corporation, such as a Joint Stock Bank, with relation to paying cheques". Nevertheless the bank will be responsible for lack of good faith on the part of any of its employees, so that it would be liable under this Section if a cheque was paid by a cashier in spite of the fact that he had good reason to doubt the genuineness of an indorsement.

<sup>1</sup> *Law of Banking*, 3rd edn., page 240.

The phrase "in the ordinary course of business" is more easily explained, for a banker would certainly lose the protection of Section 60 if he paid a cheque bearing a forged indorsement out of his usual business hours, or if, without reasonable inquiry, he cashed a cheque for a large amount over the counter to a person who was obviously suspicious and unlikely to be entitled to such a document, e.g., a tramp. Again it would certainly not be in accordance with the ordinary course of business if a banker omitted to examine the indorsements on a cheque before payment, and a customer who sought to evade liability in respect of a cheque would, without doubt, have very good grounds for holding a banker liable if he could show that the indorsements on the paid cheque were incomplete or irregular, indicating that they could not have been examined by the banker with reasonable care. Moreover, in regard to *crossed* cheques, a banker will not pay in the ordinary course of business unless he pays in accordance with the crossing in the manner laid down by Section 80, which is dealt with below.

The whole question is one of fact to be determined by the circumstances of each case, but it must be understood that payment in the ordinary course of business does not necessarily imply that *cash* for a cheque is to be handed across the counter. The cheque is duly paid either by transferring to the holder the amount in legal tender currency or by the holder's unconditional acceptance of the banker's own draft or cheque in full discharge, or when the cheque is paid merely by entries in the banker's books, such as may result, for example, from crediting to one customer the amount of a cheque drawn by another customer, or when credit is given by the banker in his books to the banker collecting the cheque through the usual clearing channels. In order that the last mentioned shall operate as a good discharge payment must be made by the banker in accordance with the rules of the Clearing House, or in accordance with the recognised customs of the local clearing, for any departure from established practice may render the banker open to the charge of having paid out of the usual course of business.

If the paying banker cannot bring himself within the protection of either of the two sections referred to, he cannot debit the amount of a cheque bearing a forged indorsement to the account of his customer, and if the amount has been so debited, it must be refunded. Furthermore, the banker may be held liable to the true owner of the cheque, i.e., the person who was legally entitled to the instrument and its proceeds, in an action for "*conversion*" of his property (see *post*, page 351), and if such an action succeeded the banker would be compelled to pay the value of the document to the true owner, being left to recover if possible from the person to whom the cheque was paid. It follows, therefore, that if a banker pays a cheque bearing a forged indorsement and is unable to bring himself within the protection

of one or both of the sections mentioned, he may have to pay the amount of the cheque *twice*, once to or for the person fraudulently obtaining the money, and once to the true owner. In the latter case the drawer's account may be debited, so that the ultimate result is that the banker loses the amount of the cheque once.

It must be understood also that the protection of the section referred to extends only to the paying banker. Thus the true owner of a cheque on which the indorsement is forged can usually succeed in an action for conversion against any other party or parties who have dealt with the instrument after the forgery, as, for example, a tradesman who has quite innocently cashed the cheque on behalf of a customer or other person, or another banker who had cashed it for a customer or for a stranger, or even a collecting banker who can be regarded as having received payment of the cheque for himself by reason of his having placed the amount to the credit of an overdrawn account, or having permitted the customer to draw against the proceeds before they were actually collected. But the true owner cannot recover more than once; he may be entitled to sue several people, but if his claim is once satisfied he has no further right of action.

The payment of crossed cheques of a customer is dealt with on pages 328-331 below.

### **The State of the Customer's Account ; Sufficiency of Funds.**

There is clearly no obligation upon a banker to pay cheques drawn by his customer if such a payment is not warranted by the state of that customer's account, but as a banker may so easily be held liable for damage to his customer's credit, it is of first importance that he should take precautions to ensure that the dishonour of the cheque is really justified before it is returned. The first precaution is to ensure that all credits paid in by or for the customer have been duly entered in his account. This safeguard is desirable in the interests of the banker's business, although legally the customer cannot regard money paid in as being immediately available: Even in the case of actual cash, the banker is entitled to a reasonable time in which to make the necessary entries in his books, and, in the case of a large branch, several hours must necessarily elapse before such entries can be made.

Secondly, if the customer has more than one account in the same right, it is advisable although not essential to ascertain whether the combined balance on all the accounts will justify the payment. Although the banker has no right to combine accounts which it has been agreed shall be kept separate, it is nevertheless possible that the customer may have relied in drawing a cheque, on the fact that it would be paid by reason of his having on balance more funds at the branch than were necessary to meet it. Such circumstances may arise particularly where a customer has ample funds on deposit account, although his



current account balance may be depleted, and in such a case a banker would usually accept the slight risk involved in paying the cheque in reliance upon the customer's making the necessary provision to meet it. The banker has no need to inquire whether the customer has funds available at any other branch of the bank, for his duty is to pay only out of the moneys available at the branch whereon the cheque is drawn. Nor need the banker for this purpose take into account credits which have been paid in at another branch, although advice thereof has not been received at the branch on which the cheque is drawn.

In ascertaining whether a customer's balance is sufficient to warrant payment of a cheque, the banker is justified in reserving sufficient funds to meet any outstanding cheques which he may have marked at the customer's request, or for clearing purposes (see *post*, page 333), and if there is an express arrangement whereby a certain agreed balance shall be maintained by the customer as security for an advance, the banker is within his rights in reserving that balance before deciding whether or not he will pay a cheque. Again, if the customer has specially instructed the banker to reserve certain credits or funds in order to meet specified cheques, he cannot expect the banker to apply the money in payment of any other cheques which may be presented.

Much controversy surrounds the question as to whether a collecting banker who has credited a customer with the amount of items paid in for collection is entitled to refuse payment of cheques drawn against such credits and presented before the proceeds are received. The judgments in the famous *Gordon Case*, 1903, left the matter in doubt, and consequently many bankers endeavoured to safeguard themselves by inserting in their pass-books and paying-in slip books notices to the effect that they do not undertake to honour cheques drawn against uncleared items. In the more recent case of *Underwood v. Barclays Bank*, 1924, however, the Court of Appeal made it clear that, in the absence of an express or implied agreement giving the customer a right to draw cheques against uncleared items, a banker is entitled to return such cheques with the answer "Effects not cleared". As a rule, only customers known to be financially weak are in practice not allowed to draw against uncleared funds, cheques of good customers being usually paid without question. Nevertheless, there appears to be little doubt that if a banker did not reserve his right in *all cases* to return cheques drawn against uncleared credits, i.e., if he permitted an unconditional right to draw against such items, he would be regarded as collecting the proceeds for himself and not as an agent for his customer. In other words, he would be constituted a holder for value of the items, and in the case of crossed cheques, he would consequently lose the protection afforded by Section 82 of the Bills of Exchange Act, notwithstanding the effect of the Crossed Cheques Act, 1906. (See Chapter 15.)

It is not, of course, essential that a customer should have a *credit* balance in order that his cheques should be paid. In the first place, the issuing of a cheque when no funds are available is tantamount to making an application for an overdraft, and if the banker chooses to provide the accommodation, he can pay the cheque and rely on his customer to make the necessary arrangements to meet it. On the other hand, if there is a definite arrangement between the banker and his customer that the latter may overdraw up to a certain limit, the banker cannot dishonour cheques issued by the customer in reliance upon such an arrangement without first of all giving reasonable notice that he wishes to terminate the agreement. Such notice may, however, be given at any time, and when it has been given the banker's only duty is to pay cheques which may have been drawn by the customer prior to the receipt of the notice. Any cheques subsequently drawn may be refused payment in the ordinary way.

Cheques returned on account of insufficiency of funds are usually marked "Refer to drawer" or "R/D", and this practice is to be preferred to the answer "N/S", meaning "Not sufficient funds", which is sometimes used. The latter may be regarded as unnecessarily divulging the state of the account between the banker and his customer, although it was held in *Smith v. Cox & Co.*, 1923, not to justify damages. Particular care should also be used in returning cheques marked "N/A", signifying that the drawer has no account at the branch, for, if it should subsequently turn out that a mistake had been made by the banker, the drawer might recover very substantial damages, since it is a criminal offence for a person to issue cheques on a bank at which he has no account.

Although, in practice, answers are invariably given on cheques which are refused payment, and the rules of the London Clearing House require that such answers shall be given, the holder of the cheque has actually no right to demand such an answer or to be informed of the banker's reason for refusing payment. This is, of course, in accordance with the general rule of law that there is no privity of contract between a paying banker and the holder of a cheque.

### Legal Reason or Excuse prohibiting Payment.

The banker's obligation to pay his customer's cheques is determined by any legal reason or process which prohibits him from carrying out his duty. In this connection Section 75 of the Bills of Exchange Act, 1882, provides:—

75. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

- (1) Countermand of payment.
- (2) Notice of the customer's death.

In addition, the banker's authority is terminated in any of the following cases:—

- (3) Notice of the customer's insanity, or bankruptcy, or in the case of a limited company, notice of its winding up.
- (4) Service upon the banker of a garnishee order (*see* Chap. 10) or of any injunction or similar order from the Court prohibiting transactions upon the account.
- (5) Notice of an assignment by the customer of the credit balance upon his account.
- (6) In the case of trust accounts, knowledge that the customer intends to apply the funds in breach of the trust, and
- (7) Knowledge of any defect in the title of the person presenting the cheque.

Each of these reasons for refusing payment of a customer's cheques is dealt with at length in the following paragraphs.

### Countermand of Payment.

In order to justify the banker in taking the serious step of refusing payment of a cheque, the countermand or "stopping" of payment should be expressly communicated to the banker and duly authenticated by the customer's signature in the form accepted by the banker for operations upon the account. Accordingly, in taking instructions from a customer to stop a cheque or cheques it is usual for a banker to take full particulars in writing, and to require the signature of the person or persons entitled to draw cheques on the account. A stop may be registered by one or several partners, trustees, or executors in respect of a cheque which may have been given by one, some, or all of the persons so associated, i.e., one partner may countermand the payment of a cheque drawn by another. Similarly, if cheques are to be signed by any two directors of a company, a countermand of payment is effective if signed by two directors other than those who have issued the cheque. Subject to such exceptions, only the drawer of a cheque is entitled to stop payment; so, if a banker is advised by the true owner of a cheque that it has been lost or stolen, he should at once advise the drawer of the fact, or request the true owner to do so, with the object of obtaining written instructions to stop payment of the instrument. If in the meantime the cheque is presented, the payment should if possible be postponed pending the receipt of such instructions. But if the cheque was indorsed before it left the holder's possession, the banker may be compelled to pay if the title of the presenter appears to be quite satisfactory, for a full legal title may be obtained by an innocent holder to a cheque which either originally or by indorsement is payable to bearer. On the other hand, if the cheque is payable to order and had not been indorsed by the holder before loss or theft, payment should be definitely refused, as the presenter cannot claim except through a forged indorsement.

The drawer's right to stop payment of a cheque exists up to the last moment when payment may be made or refused by the

banker. Thus if the banker has a certain time within which he may decide whether to pay or to return the cheque, the drawer's right to countermand payment exists until the expiration of that time. For example, in the case of cheques presented through the clearing, the banker has up to the close of business on the day of presentment to pay or to return the cheque, so the drawer's right to stop payment exists until the close of business at the branch on that day, and he may exercise this right even though the cheque has been paid, cancelled and debited to his account.

A banker is not justified in definitely stopping payment of a cheque in reliance upon instructions communicated by telephone or by an unauthenticated telegram, unless in the former case he is reasonably certain that the instructions are given by the drawer himself or by his known agent. It would, nevertheless, be very inadvisable to ignore instructions which are not authenticated, and accordingly the proper course in such circumstances is to postpone payment of the cheque pending confirmation of the stop, a suitable answer being, "Payment countermanded by telegram (telephone), and postponed pending confirmation". Such an answer reasonably protects the credit of the customer, and, at the same time gives the banker an opportunity of communicating with him in order to obtain confirmation of the countermand.

A banker who pays a cheque which has been effectively countermanded cannot debit the amount to his customer, nor can he recover the payment from the person who received the money unless the recipient acted without good faith. It is, therefore, of first importance that a proper record of all stops should be maintained at the branch, the usual procedure being to register essential particulars of all cheques so countermanded on a "Stop Card" placed in the hands of each paying cashier, and also to register the details in red ink on every page of the customer's ledger account, so that the stop is constantly brought to the notice of the clerk responsible for posting up cheques. Notice of a stop should also be sent by the banker to any branches of the bank itself or of other banks at which the customer's cheques may be cashed under advice.

### **Notice of Death, Insanity, or Bankruptcy.**

In order effectively to prevent a banker from paying cheques, notice of his customer's death, bankruptcy, or insanity must be express or constructive. As to what is considered constructive notice is usually a question of fact, but such notice need not be express or precise; and although a banker cannot reasonably be expected to act upon unconfirmed rumours, he cannot safely disregard information which may reasonably be regarded as reliable, as, for instance, an announcement in a responsible newspaper.

In the cases of death and insanity, difficulties rarely arise, and while a banker should refuse payment of cheques as soon as he receives reliable information, he is nevertheless entitled to debit the customer with cheques presented and paid before such information is received.

On the other hand, considerable difficulty surrounds the determination of the precise moment when a banker's authority to pay cheques is revoked by reason of the bankruptcy of his customer. The matter cannot be dealt with at great length in the space at our disposal, but it may be stated in the first place that a banker should discontinue operations on a customer's account and should refuse payment of all cheques as soon as he receives notice or information that his customer has committed an *act of bankruptcy* (see page 115, *ante*), or that a Receiving Order has been made against him. As from the commencement of the bankruptcy, all property of the debtor, including the balance on his current account (if any), belongs to the trustee, who, by virtue of the doctrine of "Relation back", can with certain exceptions claim any property of the debtor which has passed through his hands or through the hands of third parties since the date of commencement of the bankruptcy. The chief difficulty arises by reason of the arbitrary way in which this date is fixed, for by Section 37 of the Bankruptcy Act, 1914, it is provided that a person's bankruptcy relates back to the date of the act of bankruptcy upon which a receiving order is made against the debtor, or if the debtor is proved to have committed more than one act of bankruptcy, to the date of the first of such acts committed within three months before the presentation of the petition.

The general result of the doctrine of relation back so far as it affects a banker paying cheques drawn by an insolvent person, is that the trustee can reclaim from the bank any funds of the debtor paid out by the bank after the commencement of the bankruptcy, *unless* the payment falls within the definition of certain protected transactions which are thus defined in Sections 45 and 46 of the Bankruptcy Act, 1914:—

45. Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements, assignments and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy—

- (a) Any payment by the bankrupt to any of his creditors;
- (b) Any payment or delivery to the bankrupt;
- (c) Any conveyance or assignment by the bankrupt for valuable consideration;
- (d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration;

Provided that both the following conditions are complied with, namely—

- (i) that the payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order; and
- (ii) that the person (other than the debtor) to, by, or with whom the

payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.

46. A payment of money or delivery of property to a person subsequently adjudged bankrupt, or to a person claiming by assignment from him, shall, notwithstanding anything in this Act, be a good discharge to the person paying the money or delivering the property, if the payment or delivery is made before the actual date on which the receiving order is made and without notice of the presentation of a bankruptcy petition, and is either pursuant to the ordinary course of business or otherwise *bonâ fide*.

Thus, by virtue of Section 46, a payment or delivery of goods or securities by a banker to *the debtor himself* in good faith will be protected even if the banker knows of an available act of bankruptcy, *so long as* he has no knowledge that a petition has been presented against the debtor, if such is the case, and so long as the payment is made *before the date of the Receiving Order*. But this protection does not extend to payments made to *third parties*, so that if, after the debtor has committed an available act of bankruptcy, the banker pays a cheque drawn by the debtor in favour of a *third party*, the banker may have to refund the money to the trustee if the debtor is afterwards made bankrupt, even though the banker *had no knowledge of the act of bankruptcy*. Except as is provided by the Bankruptcy (Amendment) Act, 1926, dealt with below, *no* transactions with a debtor are protected after a receiving order has been made *whether the banker has knowledge of the order or not*, so that if cheques are paid after the date of the order the banker may be called upon to repay their amount to the trustee.

The words in italics in the preceding paragraph are of importance, for, apart from the fact that bankers frequently have no means of knowing that an act of bankruptcy has been committed by a customer, they are not always able to ascertain that a Receiving Order has been made, particularly if the Court, in the interests of the debtor suspends publication or advertisement of the Receiving Order. In such circumstances the banker has, in the past, been deprived even of the protection which he sought to obtain by regularly searching through Perry's and Stubb's *Gazettes* for information of this character affecting his customers.

In consequence of the operation of the law as it has hitherto stood, bankers have, from time to time, been called upon to pay considerable sums to trustees in bankruptcy on account of cheques of insolvent customers paid by them in ignorance of the committal of an act of bankruptcy or of the making of a Receiving Order. The hardship of this position was clearly brought out, but unsuccessfully challenged, in the case of *In re Wigzell*, 1921, where the advertisement of a Receiving Order made against a debtor was postponed by the Court, and during the postponement the debtor's bankers, without any knowledge of an available

act of bankruptcy or of the Receiving Order, received £165 to the debtor's credit and paid out £199 against cheques drawn by him. It was held in two lower Courts and confirmed by the Court of Appeal that the banker was liable to refund the £165 received by him to the trustee subsequently appointed and that he could not take credit for the sum of £199 paid out. Lord Justice Younger suggested that the banker's remedy was to stand in the shoes of the persons to whom the cheques of the debtor had been paid and to prove in their stead in the bankruptcy, but apart from the fact that in the majority of cases the banker by so doing would receive little in the way of compensation from the debtor's estate, the remedy would not apply if the funds had been drawn out by the bankrupt himself.

The injustice of this position has, in some degree, been recognised by the legislature, for by virtue of Section 4 of the Bankruptcy (Amendment) Act, 1926, it is provided :—

4. Where any money or property of a bankrupt has on or after the date of the receiving order *but before notice thereof has been gazetted in the prescribed manner*, been paid or transferred by a person having possession of it to some other person, and the payment or transfer is under the provisions of the principal Act void as against the trustee in the bankruptcy, then, if the person by whom the payment or transfer was made *proves that when it was made he had not had notice of the receiving order*, any right of recovery which the trustee may have against him in respect of the money or property shall not be enforced by any legal proceedings *except where and in so far as the court is satisfied that it is not reasonably practicable for the trustee to recover in respect of the money or property or some part thereof from the person to whom it was paid or transferred.*

The result of this section is that the banker will be protected only if the trustee can recover the money paid from the person receiving the payment, so that if that person cannot be traced or cannot be made to pay, the banker will have to make good the amount to the estate as in the past.

In view of these considerations, the banker's best safeguard is to keep himself as fully informed as possible in regard to the general standing of his customers, and to refuse to transact business with, or to discontinue business with, persons whose financial position is known to be unsound. Furthermore, all operations on the account of a customer should be suspended as soon as the banker receives notice of an available act of bankruptcy, or of the presentation of a petition or of the making of a Receiving Order. If a trustee is subsequently appointed, the balance belongs to him and will in due course be claimed, but if no Receiving Order is made and no trustee is appointed, the banker should not permit dealings with the balance unless and until he is satisfied that the threat of bankruptcy and the likelihood of his being involved in loss are removed.

The position is similar to the foregoing in the case of the winding up of a limited company, and no cheques can be paid

by a banker who has received express or implied notice of the commencement of the winding up. Cheques refused payment by reason of the actual or impending bankruptcy of a customer or of the winding up of a company should be marked "Refer to Drawer" or merely "R/D".

### **Service of a Garnishee Order.**

The meaning and effect of a Garnishee Order are explained in Chapter 10. Cheques which have to be refused payment by reason of the fact that the available balance is tied up by order of the Court should be marked "Refer to Drawer".

### **Assignment by the Customer of his Available Balance.**

As is pointed out in Chapter 10, the credit balance on a current account ceases to belong to the customer when he assigns the debt to a third party, and due notice of the assignment is given to the banker. Cheques drawn by the customer against such a balance must therefore be returned with the answer "Refer to Drawer", but it must be noted that the fact that the balance belongs to the assignee gives the latter no right to draw cheques against the amount unless the banker has agreed to accept him as a customer, in which case the correct procedure is to open a new account and to transfer thereto the balance assigned.

Although the debt owing by a banker to his customer may be assigned to a third party, Section 53 (1) of the Bills of Exchange Act specifically provides that a bill of exchange (which includes a cheque) does not, except in Scotland, operate as an assignment of funds in the hands of a drawee available for the payment thereof. The result of this provision is, therefore, that the holder of a cheque has no claim against the banker in respect of funds in his hands to the credit of the drawer, and also that, if a cheque is dishonoured because the balance on the drawer's account is insufficient to meet it, the holder obtains no claim to that balance either as against the banker or the drawer. So far as the banker is concerned there is no privity of contract between him and the holder of a cheque, and the latter cannot compel the banker to pay out the balance to the credit of the drawer in part payment of a cheque which is presented.

Moreover, it is doubtful whether a banker is entitled to receive for the drawer's credit from the holder of a cheque funds which would bring the available balance up to an amount sufficient to meet the cheque which is presented, for in such a case the banker would run some risk of liability to damages for unjustifiable disclosure of the state of the customer's account. Some authorities suggest that such a course may even amount to fraud on other creditors of the customer. On the other hand,



the Institute of Bankers express the opinion that, if the banker makes no disclosure of the state of the account but the payee learns of the state of the account from other sources and tenders an amount sufficient to make up the balance, then the banker would be justified in paying the cheque presented.<sup>1</sup>

Again, the fact that one cheque is dishonoured because the amount available is insufficient to meet it will not justify the banker in refusing payment of a subsequent cheque or cheques which fall within the balance. Difficulty sometimes arises, however, if several cheques are simultaneously presented and the available balance is insufficient to pay them all, although it will cover one or some of the cheques. Apparently the banker incurs no liability if in such circumstances he refuses to pay any of the cheques, but the Council of the Institute of Bankers is of opinion that the best course where the amounts are not equal is to pay the larger cheque if the balance is adequate. Presumably if two cheques of equal amounts are presented simultaneously, either of which can be paid but not both, the best course is to return both instruments, although the banker would usually make every effort to communicate with the drawer and obtain his instructions. It is suggested that a way out of the difficulty in such circumstances is for the banker to pay the cheque bearing the earlier date, if the dates differ, but if the dates are identical advantage cannot be taken of this right.

Although there is not usually any privity of contract between a banker and third parties, it is possible for the banker to make some special arrangement with the payee or holder of a cheque whereby such privity is established between them, as, for example, where a banker expressly or impliedly leads the holder to believe that a cheque in his hands will be paid if it is presented. (See below, "Marking Cheques at the Request of the Holder".) In such circumstances the banker is bound to pay the instrument, otherwise he becomes liable to the holder for breach of express or implied contract.

### **Knowledge by the Banker of an Intended Breach of Trust.**

It has been pointed out in Chapter 7 that persons transacting business with trustees may render themselves liable if they are party to any transaction which is clearly in defiance of the usual conditions attaching to trusteeships. A banker is no exception to this rule, and therefore he must refuse payment of cheques drawn upon a trust account if he has any express or constructive information that the drawer is committing a breach of trust. If, for example, a banker can reasonably be presumed to know either by the heading of the account or otherwise, that the money deposited therein is held by the drawer on behalf of an orphan child, the banker would run some risk if he paid out money from

<sup>1</sup> *Questions on Banking Practice*, 7th edn., No. 490.

the account for purposes which quite obviously were in breach of the trust. But this does not imply that the banker must query every cheque drawn; he is only liable if the circumstances are such that any reasonable man would be put on an inquiry.

Again, if a customer has two accounts, one private and the other in a fiduciary capacity to which public moneys are paid, as may arise in the case of the accounts of a treasurer to a local authority, the banker should not permit payments to be made from the treasurership account to the private account unless he has good reason to believe that such transfers are in order.

### Defect in the Title of the Presenter.

It is clear that a banker must not pay cheques drawn by his customer if he has reason to believe, or if he can reasonably be assumed to know, that the presenter has no right or title to the instrument. A case of this kind has already been cited in considering "countermand of payment", where it was shown that if the drawer or a holder advised a banker of the loss or theft of an *unindorsed* order cheque, the cheque must on no account be paid as it must presumably bear a forged indorsement if presented for payment. This principle applies even in the case of a cheque which was originally payable to bearer, or which has by indorsement become so payable, for such a cheque should not be paid without careful inquiry if the banker has been advised by the drawer or a holder that the cheque has been lost or stolen. In such a case, or in any similar circumstances where the paying banker has good grounds for suspecting that the presenter's title may be defective, payment should be postponed pending inquiries or pending the drawer's confirmation. By so doing the banker incurs no liability either to the holder or to the drawer. So far as the holder is concerned, there is no privity of contract between him and the banker, so that he has no right to enforce payment against the banker even if he has an absolute title to the instrument, e.g., if he is a *bona fide* holder for value of a bearer cheque. In regard to the drawer, he could not claim that his credit was damaged if the banker postponed payment in the circumstances mentioned. On the other hand, it must be remembered that the holder in due course of a bearer cheque which had been lost or stolen has a good title to the instrument against all the world, including the true owner, so that the amount would ultimately have to be paid to him by the banker on the drawer's behalf if the holder's answers to inquiries were satisfactory.

### Rules Governing Presentment for Payment.

The final condition upon which depends the banker's obligation to pay his customer's cheque is that it shall be presented by the holder or his authorised agent at the branch at which the

customer's account is kept, during recognised business hours. This is in accordance with the Rules governing the presentment for payment of bills of exchange generally, which are contained in Section 45 of the Act (Chapter 16.) By this section presentment must be made at "a reasonable hour on a business day"; in the case of a cheque this would be any time during recognised business hours. "The proper place of payment", as defined by the section, is the address of the bank branch given on the face of the cheque. If such an address is not given, but the name of the bank is specified, presentment at the Head Office would presumably be recognised.

By Sub-section 45 (8) presentment through the Post Office is sufficient, where authorised by agreement or usage. This provision legalises the presentment of cheques through the clearings, but the presentment of a cheque through the post by the *holder* with a request for cash in exchange would not be a presentment sanctioned by usage or custom, and payment in such circumstances should not be made *unless* the request is made by the *drawer* himself.

Sub-section 45 (2), quoted on page 256, is of special importance in regard to cheques, for it provides that the parties are discharged unless presentment of a bill on demand is made within a reasonable time. Thus an *indorser* is discharged from liability unless a cheque bearing his signature is presented for payment within a reasonable time of his indorsement. In regard to the drawer, Section 45 (2) must be read in conjunction with Section 74 (1), quoted on page 256, by virtue of which it will be noted that the drawer of a cheque is discharged to the extent of the *damage* which he suffers by reason of the delay.

"A reasonable time" for purposes of presentment is not strictly defined by the Act, but by virtue of Section 74 (2) is to be determined according to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

The general rules excusing delay in presenting bills for payment and excusing non-presentment, contained in Section 46 (Chapter 16), apply *mutatis mutandis* to cheques, although they are not likely to apply so frequently as in the case of bills of exchange other than cheques.

In accordance with Sub-section 52 (4), where the holder of a cheque presents it for payment he must deliver it up to the party, i.e., the banker, making the payment. Thereafter, the banker is entitled to retain the paid cheque as a voucher evidencing the payment made by him on behalf of his customer, the drawer, until such time as the account between him and the drawer is settled. After settlement of the account between them, the drawer is entitled to any paid cheques as vouchers evidencing the relative payments as between himself and the payees. As a rule, paid cheques are handed to the drawer

against his signature to a receipt, which is usually obtained at the same time as the *docquet* referred to on page 189, by which the drawer acknowledges the correctness of the entries in his account.

### The Payment of Crossed Cheques.

The protection afforded to the paying banker by Section 60 of the Bills of Exchange Act, 1882, applies generally to *all* cheques drawn on a banker, but in regard to *crossed* cheques the Act imposes certain special duties upon the banker, and also affords him a certain degree of additional protection if he acts in accordance with its provisions relating to crossed cheques. The duties of a banker in connection with the payment of crossed cheques are thus defined by Section 79 of the Act :—

79. (1) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

(2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

A crossing is thus a direction to the paying banker, placed on the face of a cheque by the drawer or subsequent holder, that the proceeds of the instrument are to be paid *only to a banker*, and, if a banker is named in the crossing, then only to that banker. Unless this instruction is obeyed the paying banker renders himself liable to the *true owner* of the cheque for any loss which he may sustain. It is to be noted that the true owner is the person who is legally entitled to the proceeds and is not necessarily the drawer of the cheque, so that this liability of a banker to a third party is an exception to the general rule that he is accountable only to his customer.

But in addition to this liability to the true owner, payment of a cheque in contravention of the crossing would be regarded as negligence sufficient to prevent the banker from debiting the amount to the account of the customer if any loss should result from his negligent action. The crossing on the face of the cheque is to be construed as part of the customer's mandate, whether it is put on by the customer himself or by a subsequent holder,

and that mandate must be implicitly obeyed if the banker is to be regarded as having paid in due course. Consequently, if a banker pays a cheque bearing a forged indorsement in contravention of the crossing, he will be unable to debit the amount to his customer and, at the same time, he will incur liability to the true owner for conversion. In the latter case, the damages recovered by the true owner will be the amount of the cheque, so that the banker, in such circumstances, would stand to lose *twice*, unless he could recover one payment from the person who originally received the amount of the cheque by virtue of the forgery, or unless the drawer permitted the banker to debit his account in respect of the amount recovered by the true owner.

The duty imposed upon a banker in regard to crossed cheques applies just as much if the cheques are drawn in favour of another customer of the same branch. Accordingly, such cheques should not, in any circumstances, be cashed over the counter, but should be placed to the credit of the person paying them in, for whatever the circumstances, a banker who pays out cash on account of a crossed cheque does so entirely at his own risk, and will be liable to the true owner and unable to debit his customer if the cheque has been the subject of any wrongful dealing.

In view of the obligation and liability thus imposed upon a banker to act in accordance with the crossing on the face of a cheque, Sub-section (2) of Section 79 reasonably provides that a banker who pays in good faith and without negligence shall not incur any liability if the crossing has been wrongly obliterated or materially altered and the obliteration or alteration is not apparent. Accordingly, if such a cheque is paid the banker is entitled to debit his customer and is freed from liability to the true owner.

### **The Protection of a Banker Paying Crossed Cheques.**

Apart from the protection afforded to a banker who pays a cheque upon which the crossing has been obliterated or materially altered, general protection is afforded in the following terms by Section 80 to a paying banker who obeys the instructions embodied in a crossing :—

80. Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

To obtain the protection of this section a banker must not cash a cheque over the counter unless in so doing he is paying the amount of the cheque to another banker. The cashing of a crossed cheque for a customer or for a stranger deprives the

paying banker of the protection here afforded, and renders him liable to the true owner and unable to debit the customer if the cheque or its proceeds have been or are being wrongly appropriated.

It is sometimes considered that a paying banker will lose the protection of this section on the grounds of negligence if he pays a cheque crossed "A/c payee" which bears a number of indorsements. Undoubtedly, he must be presumed in such a case to have notice that he is not paying the cheque to the account of the payee, and if the instructions were placed on the cheque by the drawer, the banker's position might be a difficult one, particularly if it should turn out that one of the indorsements was forged. In such a case the true owner and the drawer of the cheque might contend that the banker could not be protected by Section 60, by reason of not having paid the cheque "in good faith and in the ordinary course of business", nor by Section 80, for not having paid the cheque "without negligence". Sir John Paget expressed the opinion, however, that the paying banker in such circumstances incurs no liability because the drawer's mandate can be regarded as contradictory and ambiguous, by reason of the fact that the words "Account payee", "Account payee only", "Account A. B.", etc., have no statutory recognition by virtue of which they can be regarded as prohibiting negotiation of the cheque.

The provisions of Section 79 (2) may also be regarded as absolving the paying banker from the necessity of taking notice of any such additions to a regular crossing which are not countenanced by the Act. Apart from the fact that it is obviously impossible for a paying banker to ensure that the funds have reached the required destination, it would be both impracticable and unreasonable to permit the drawer or holder of a cheque to extend without limit the obligation placed upon the paying banker in reference to crossings. The question is not, however, likely to arise in the future as most bankers now refuse to collect cheques so marked for any account other than that of the payee.

If a crossed cheque were presented for payment bearing the words "A/c payee only", with or without the addition of such words as "Not transferable", and bearing evidence of having been negotiated and paid into an account other than that of the payee, the paying banker would be justified in returning the instrument with such an answer as "Cheque irregularly drawn", "Form of cheque irregular" or "Crossing irregular; requires drawer's authority". If such words have been added by a holder, the paying banker is justified in ignoring them, for a holder has no statutory right to alter or add to a crossing except in the manner prescribed by the Bills of Exchange Act. But it is obvious that the banker's difficulty is to determine whether the words have, in fact, been placed on the cheque by his

customer with the object of advising the banker how he wishes the cheque to be paid, and, if such is the case, the banker cannot be blamed for demanding further confirmation of the drawer's wishes.

Similar arguments are sometimes advanced in regard to cheques crossed "Not negotiable" which are paid without question by the paying banker although they bear more than one indorsement as evidence of their having been transferred. As has been pointed out, however, a "not negotiable" crossing does not make the cheque *not transferable* within the meaning of Section 8 (4) of the Act (see page 208). The words merely act as a warning that the transferee of such an instrument shall not be capable of receiving a better title to it than was possessed by his immediate transferor, and no duty is imposed upon the paying banker to inquire whether a valid title was, in fact, passed when the instrument was transferred.

If he is to retain his protection, the paying banker should, however, refuse payment of a *not transferable* cheque which bears evidence of negotiation, provided that the fact that the cheque is not transferable is indicated in an unmistakable manner. The cheque should be drawn payable to the payee "only", the words "order" or "bearer" should be crossed out and initialled by the drawer, and as an additional safeguard the words "not transferable" should be clearly written on the face of the instrument. Such a cheque should be paid if it bears the indorsement of the payee only, and even then the indorsement should be confirmed by the collecting banker unless the payee himself presents the cheque for payment and is well known to the banker paying the cheque.

As has been stated, the banker cannot be expected to fulfil his obligations if the crossing or additions on the face of a cheque leave him in doubt as to what he should do, and if such is the case his best plan in the interests of both himself and the customer is to return the cheque as an ambiguous or embarrassing document. Such a course should be adopted in the case of an uncrossed cheque which bears across its face the words "Not negotiable" or the words "Not transferable, a/c payee only", and yet affords evidence by the existence of more than one indorsement that it has been transferred and paid in to a bank by someone other than the payee.

### The Protection of Paying Bankers in Regard to Crossed Documents other than Cheques.

By Section 95 of the Bills of Exchange Act, it is provided :—

95. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.

The paying banker is thus protected if he pays a dividend warrant in accordance with the crossing and it subsequently

transpires that the instrument has been discharged by a forged or unauthorised signature. (See also Chapter 19.)

The paying banker is further protected by Section 17 of the *Revenue Act*, 1883, in respect of documents which are not strictly cheques, by reason of the fact that they do not conform to the legal requirements of a cheque which have been discussed in Chapter 12, as, for example, conditional orders to pay which order the banker to make payment only if an attached receipt is duly signed and dated. This section reads as follows :—

17. Sections 76 to 82, both inclusive, of the Bills of Exchange Act, 1882, and Section 25 of the Forgery Act, 1861, shall extend to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the document were a cheque: Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument.

By virtue of this section a paying banker incurs no liability to the true owner of a conditional order if payment of the order is made by the banker, in good faith and without negligence, and strictly in accordance with the crossing.

But it should be observed that the section clearly provides that “nothing in this Act shall be deemed to render any such document a negotiable instrument”, so that a banker paying a conditional order which bears evidence of having been transferred will certainly incur liability to the true owner if payment is made on a forged indorsement. He is only protected if he pays the instrument to or for the account of the payee, so that if a conditional order is presented for payment bearing two or more indorsements, payment thereof should be refused, for in the event of one of such indorsements being forged, it would be no defence on the part of the banker to prove that he had paid the instrument in accordance with the crossing.

It will be noted also that the section applies only to orders for payment which are drawn *on a banker* by the customer, and does not therefore embrace the documents in the form of cheques which are drawn by local authorities on their treasurer, for even though the treasurer may be the manager of a branch, the orders must be regarded as being drawn on him and not on the bank. If, therefore, such a document is paid and it subsequently turns out that the indorsement is forged, the treasurer will be liable to the true owner for conversion, and he will be unable to debit the amount to the account of the local authority unless he can show that, as between himself and the authority, he is to be regarded as the banker to the authority. It follows that in such circumstances the treasurer may be compelled to pay twice, once to the person who has received the payment and once to the true owner.

It is for this reason that special precautions are necessary when a bank manager undertakes to act as treasurer for a



local authority. He should obtain from the authority a mandate embodying an express resolution appointing him as the treasurer, and instructing him to open in his own name on behalf of the authority an account out of which he is to pay orders drawn upon him in the manner prescribed. The mandate should also contain an undertaking by the authority to indemnify the treasurer in the event of his paying in good faith and without negligence any orders of the authority bearing a forged or unauthorised indorsement. Where satisfactory arrangements of this kind are made, the treasurer should be in a position to debit the authority in respect of an instrument bearing a forged indorsement, but unless it is expressly provided in the mandate, he will not be able to claim indemnity from the authority as against the claims of the true owner, whose remedy against the treasurer is, of course, a *personal* one for conversion of his (the true owner's) funds.

But although in such cases it is the treasurer himself and not the bank which is liable, there is usually no question that the loss is ultimately borne by the bank, for in accepting such treasurerships the manager is acting in the interests of the bank which he represents. The position is, however, one which bristles with difficulties so far as the payment of cheques is concerned, although matters would without doubt be considerably improved if the Ministry of Health would depart from its rigid insistence that these orders shall be payable to order and not to bearer. If they were made payable to bearer, the treasurer would not, of course, incur any liability to the true owner in respect of such documents which had been lost or stolen, providing that payment thereof was made in good faith and in the ordinary course of business.

### Marking Cheques as " Good " for Payment.

The " marking " of a cheque means the placing thereon of the signature or initials of a banker (accompanied, as a rule, by the word " Good " ), in indication of the fact that at the time of the marking he has in his hands sufficient available funds of the drawer to justify his regarding the cheque as being " good " for payment. The exact legal significance of such a marking depends upon whether it is done on the instructions of the drawer, or at the request of the payee or holder, or of another banker, but its general effect is to facilitate negotiation or acceptance of the cheque as a means of payment.

### Marking a Cheque on the Instructions of the Drawer.

A customer sometimes requests his banker to mark his cheque as good for payment when he wishes to satisfy the payee that there is not the slightest doubt that the cheque will be

met, as, for example, when the cheque is being taken by the payee in exchange for the deeds of a house, or in payment of a bill of exchange, or in payment for negotiable securities. The banker will *mark* the cheque in the top left-hand corner if there are sufficient funds on the customer's account, and he is thereafter justified in regarding the cheque as having been constructively paid, so that he can retain on the account sufficient funds to meet it when presented, and, if necessary, dishonour any cheques subsequently presented which would deplete the amount so retained.

A cheque marked at the drawer's request may be paid when it is presented even though in the meantime the drawer may have died, or become bankrupt or insane, and even though a garnishee order is served on the banker attaching the balance on the drawer's account, for funds to the amount of the cheque are regarded as having been definitely appropriated to meet it. Furthermore, the drawer has no right to countermand payment of a cheque marked at his request if the cheque has once left his possession, for the banker, having "undertaken a moral and professional obligation, founded on recognised custom, towards any other banker who may present the cheque for payment",<sup>1</sup> cannot be expected to agree to a countermand which may operate to his detriment.

It has apparently not yet been decided how long a banker may thus retain funds to meet a marked cheque if that cheque is not presented, but it is not likely that a banker would for long continue to dishonour cheques in such circumstances without communicating with his customer on the matter. In this connection, it should be noted that the marking of a cheque at the request of the drawer does not in any sense bind the banker to the payee or subsequent holder, for the marking is neither an admission of liability to pay the instrument nor an acceptance of the cheque within the meaning of the Bills of Exchange Act.

### Cheques Marked at the Request of the Payee or Holder.

In this country the marking of cheques at the request of the payee or of a subsequent holder is almost unknown, although the practice is quite common in Canada, Newfoundland and the United States where "the only effect of a drawee bank initialing a cheque drawn upon it, is to certify that it has funds of the drawer in its hands sufficient to meet its payment, and thus to add to the credit of the drawer that of the bank on which it is drawn".<sup>2</sup>

The signature or initials of the banker for this purpose cannot be regarded as an acceptance of the cheque by the drawee, for apart from the fact that such an acceptance is not provided for

<sup>1</sup> Paget, *Law of Banking*, 3rd edn., page 194.

<sup>2</sup> Privy Council in *Gaden v. Newfoundland Savings Bank*, 1899.

by the Bills of Exchange Act, it would presumably be illegal under the Bank Charter Act, 1844, Section 11 of which prohibits any banker from issuing or accepting a bill payable upon demand. Accordingly, the banker cannot be held liable *in respect of his signature or initials* on the instrument, although Sir John Paget<sup>1</sup> apparently inclines to the opinion that, by so marking a cheque at the request of a specific holder, the banker impliedly undertakes to pay the cheque and will be bound to do so if it is presented by another banker. The object of the marking is to facilitate negotiation of the instrument, and presumably the banker must stand by his implied guarantee of the validity and value of the cheque for any purpose to which it may thereafter be applied.

In view of this, the position becomes a difficult one for the banker if the customer stops payment of the cheque after it has been marked but before it is presented for payment, as he is undoubtedly entitled to do if he so desires. In such a case the banker cannot pay the cheque to the debit of his customer's account, and if he does pay he will have to bear the loss himself.

When, therefore, a request is made by the holder that a cheque should be marked, bankers in this country safeguard themselves where possible by issuing their own drafts payable on demand, thus providing the holder with a fully negotiable instrument and enabling them to debit the amount at once to the account of the customer.

### Cheques Marked at the Request of Another Banker.

As between bankers and bankers, there is a long established custom whereby cheques received too late in the day for presentment through the usual clearing channels are marked as "Good" for payment by the paying banker, at the request of the collecting banker. Thus "it is a rule among London Clearing Bankers that all cheques presented by one Clearing Bank to another for payment, must, whether open or crossed, be presented through the Clearing House. Cheques received from customers too late for presentation through the Clearing House on the day of receipt are often, if the amount or other circumstances make it desirable to ascertain the fate of the cheque as early as possible, sent direct after closing hours to the bank on which they are drawn with a request to mark the cheque. Cheques so marked are, next morning, presented for payment in the usual course, and are always, as a matter of course, paid". (*Questions on Banking Practice*, No. 504.)

A similar custom exists between local bankers in respect of cheques which are received too late for presentment through the local clearing, and where it is desired to ascertain whether the instrument will be duly paid or not.

<sup>1</sup> *Law of Banking*, 3rd edn., page 196.

The marking of cheques in accordance with this custom undoubtedly constitutes a constructive payment of the cheque by the banker, entitling him specifically to appropriate the necessary funds of the drawer to meet the cheque when it is finally presented, and to return any cheques presented subsequent to the marking which would deplete the funds so appropriated. It cannot well be otherwise, for this marking of cheques for clearance purposes has been legally recognised as an implied undertaking or promise to pay on the part of the banker on whom the cheque is drawn. Thus in *Goodwin v. Roberts*, 1876, Chief Justice Cockburn stated, "a custom has grown up among bankers themselves of marking cheques as good for purposes of clearance, *by which they become bound to one another*".

It follows, therefore, that the appropriation by the paying banker of funds to meet a cheque marked for clearing purposes is on a par with such an appropriation made in respect of a cheque marked at the request of the drawer, and is not affected by the death, bankruptcy, or insanity of the drawer, or by the service of a garnishee order attaching the balance of the drawer's account. The money is regarded as having been specifically applied for a particular purpose which the banker is bound to fulfil. Furthermore, although the customer may not have strictly instructed the banker to mark his cheque or cheques in this manner, the marking of a cheque for clearing purposes is an appropriation of the necessary funds to a specific person which puts an end to the customer's right to countermand payment, apart from the fact "that the customer impliedly bargains not to revoke his mandate so as to leave the banker liable for anything done by him in the ordinary course of business".<sup>1</sup>

Particulars of the amount and name of the payee of any cheque marked by the banker should be clearly noted in red ink on the relative ledger account, so that the ledger clerk or any other person whose business it is to watch the account will know how much of the balance is available to meet other cheques which may be presented. As an additional or more efficient safeguard, some bankers note the particulars of marked cheques in pencil immediately under the last entry in the relative ledger account. No cheques can thereafter be posted to the account unless such a note is seen, but however the note is made, it should be effectively cancelled or erased when the cheque to which it relates is duly presented and paid.

### Advising the "Fate" of Cheques by Telegram or Telephone.

A paying banker is sometimes requested to advise, by telegram or telephone, the "fate" of a cheque drawn by his customer, i.e., he is asked to send a message by telegram or telephone

<sup>1</sup> *Questions on Banking Practice*, 7th edn., No. 504.

stating whether the cheque is paid or unpaid. Such a request may emanate from a collecting banker, who may either wire or 'phone to the paying banker requesting him to reply by telegram or telephone as to whether he will pay a certain cheque.

The paying banker should exercise considerable precaution in acceding to such requests, for apart from the fact that he has no means of knowing in whose hands the cheque may be, he may himself become liable for the amount if he so far commits himself in replying as to be *bound* to honour the cheque on presentment. If, for example, the paying banker replies, "Yes, cheque will be paid", or "Yes, if in order", he will be unable to refuse payment when the instrument is presented (provided that it is in order), even though the drawer may in the meantime have stopped payment, or have died, or become bankrupt or insane.

Such a promise to pay by telegram or telephone is not a payment in the ordinary course of the paying banker's business sufficient to justify his debiting the drawer's account in *any event*, and he has no power to retain or specifically appropriate funds of the drawer to meet such a cheque. If the banker endeavours so to appropriate funds of the drawer and is consequently compelled to dishonour cheques which may subsequently be presented, he may render himself liable to the drawer for damage to his credit. Moreover, it has already been stated that the drawer has the right to stop payment of a cheque at any time up to the expiration of the period within which the banker is allowed either to pay or return the cheque. It follows, therefore, that the *only* correct procedure in such circumstances is for the paying banker to give a non-committal reply, such as "Cheque would be paid if in order *and presented now*". An answer of this kind leaves it open to the paying banker to dishonour the cheque if, on presentment, the funds on the drawer's account do not justify the payment, or if payment of the cheque has in the meantime been countermanded by the drawer, or if any other event occurs, such as the death or bankruptcy of the customer, which makes it impossible for the cheque to be paid.

A similar non-committal answer should be given in the case of cheques which have previously been dishonoured, but which are recalled either at the drawer's request, or because the paying banker, having received sufficient funds, desires to protect his customer's credit by paying the cheque. In such circumstances a suitable answer would be, "Cheque *Reynolds* would be paid if re-presented now and in order".

The foregoing remarks do not, of course, apply in circumstances where the paying banker at the drawer's request advises a banker or holder by telephone or telegram that a cheque will be paid, for in such a case the banker is entitled specifically to appropriate funds to meet the cheque and to pay it on presentment in any event.

In special circumstances, cheques are sometimes presented

direct by the collecting banker with a request that the paying banker shall advise fate by telegram or telephone, i.e., the cheques are sent *direct* to the drawee-banker by special letter and not through the usual clearing channels, a prepaid telegram form for the reply being usually enclosed. In such cases the paying banker should reply, "Cheque Reynolds paid" or "Cheque Reynolds unpaid", as the case may be. If the cheque is paid its amount may be debited at once to the drawer's account, and when once advice of the payment has been sent the customer cannot thereafter stop the cheque or refuse to have it debited to his account. If such a cheque is unpaid, it should be returned by the first post to the collecting banker and a confirmation of the 'phone message or telegram enclosed.

### What is Payment in Due Course ?

We may now usefully summarise what is to be understood by *payment in due course*, as defined by Section 59 (1) of the Act, quoted above, of the various types of cheque to which reference has been made in the preceding pages.

The term "bill" in Section 59 (1), of course, includes a cheque. For our present purpose the question of good faith is not of great importance, for it may be presumed that any banker in this country would so act in paying a cheque, and it will be remembered that a thing is done in good faith even though it is done *negligently*, providing it is done honestly. (Section 90.) The question as to when a banker has notice that the holder's title is defective has already been discussed.

As to what actually constitutes payment in practice is a question of fact, but, as already pointed out, payment of a cheque is complete when the banker lays down the amount in legal tender on the bank counter with the intention that the presenter entitled to the payment shall take it up, or when payment is made by the issue to the presenter of the bank's own draft in return for the cheque, or when entries recording the payment are made in the banker's books as between one customer and another, or as between the paying banker and the banker collecting the cheque. The majority of cheques are, of course, paid on presentment through the London or local clearing, in which case payment is complete when made in accordance with the rules of the clearing concerned. (See *post*, Chapter 15.)

When payment is made in legal tender over the counter, the payment is complete and irrevocable so far as the banker is concerned as soon as the presenter of the cheque touches the money, and this is so even though the banker finds out before the presenter leaves the bank premises that the drawer's account does not justify the payment, or that he has overlooked a "stop" placed against the cheque by the drawer. Once the money has been handed over the banker must stand or fall by his action,

except in the circumstances mentioned on page 345, and if he cannot debit the customer he must himself bear the loss. Payment in due course is also made if the banker sends by post legal tender or a draft, in exchange for a cheque presented by the drawer through the post, for Section 45 of the Bills of Exchange Act provides that "Where authorised by agreement or usage presentment through the post office is sufficient". But this should not be taken to apply to the holder of a cheque as distinct from the drawer himself, and any cheques so presented for payment by a holder should be returned with the request that they should be presented by the holder in person or through a banker.

Payment of all cheques which are presented otherwise than through the clearing or by post must be made during usual business hours, otherwise the banker will lose any protection which the law affords by reason of his having paid "out of the ordinary course of business".

Generally speaking, the banker must at once pay or refuse payment of an *uncrossed* cheque which on presentment by the holder is correct in form and properly discharged, and only in exceptional circumstances can the banker postpone payment if the cheque is technically in order and the drawer has sufficient available funds to meet it. Such circumstances may arise, as has been already noticed, if a cheque for a large amount is presented for encashment by a suspicious looking person (e.g., a tramp), or if payment of a cheque has been countermanded by an authenticated telegram. In such circumstances a banker is justified in postponing payment pending confirmation by the drawer.

Payment in due course of an *uncrossed cheque*, which either originally or by indorsement is *payable to bearer*, is made by the banker when he pays the amount in good faith to anyone who tenders the cheque to him over the counter or through the clearing, and this is so even if the person in possession of the cheque is not the true owner, either because he has found or stolen the instrument, or because he has knowingly taken it from a finder or thief, or because the cheque bears a forged indorsement.

Payment in due course of a *crossed bearer or order cheque* is made by the banker when he pays in good faith and without negligence in accordance with the crossing as provided by Section 80. This payment is effective for all purposes even though the cheque is paid to a person who has no right thereto, or even though it bears a forged indorsement. Payment made in accordance with Section 80 is also valid even though the cheque is crossed "Not negotiable", or bears an unauthorised addition or additions to the crossing such as "Account payee", subject, however, to the proviso that a banker must not pay a document clearly intended to be not transferable which, nevertheless, bears evidence of transfer, as, for example, a cheque payable to "John Brown *only*" or "John Brown *not transferable*" which bears more than one indorsement.

If an *uncrossed* cheque bearing a forged indorsement is paid by a banker in accordance with Section 60, or a *crossed* cheque bearing a forged indorsement is paid in accordance with Section 80, the payment in both cases will be effective in favour of the banker *and the drawer*, so that the true owner will have no remedies against either of them. His only right of recourse is an action for conversion against the person who received the payment, or other persons who held the cheque by virtue of the forgery.

If a cheque is made payable to "*Bill attached or bearer*" (see *Questions on Banking Practice*, No. 708), or to "*Documents attached or order*" (see *Questions on Banking Practice*, No. 710), the banker should not pay the cheque unless a bill or document is attached thereto, but if the cheque as drawn is complete in itself, he is not called upon to examine the bill or the document in order to determine whether it is in order. For although any reasonable banker is prepared to do his best to safeguard the interests of his customer, it is not part of a banker's business to accept responsibility for documents in respect of which a payment may be made, unless he has expressly, or impliedly by long-established custom, undertaken to accept this responsibility.

### The Dishonour of Cheques by Non-Payment.

The provisions of Section 47 (see Chapter 17) regarding the dishonour of bills by non-payment apply generally to cheques, although the dishonour of a cheque by reason of presentment being excused is not of practical importance. By virtue of Sub-section 47 (2), on the dishonour of a cheque "an immediate right of recourse against the drawer and indorsers accrues to the holder". This means that the holder can at once demand payment from the drawer and any indorsers, and, if that is refused, bring an action against them in Court to enforce payment.

This right to sue the drawer and indorsers is, however, subject to the holder's giving proper notice of dishonour in accordance with the rules set forth in Sections 48-50 of the Act (see Chapter 17). The notice may be given in writing or by personal communication, but must be given within a reasonable time to the drawer and indorsers, or their authorised agents, otherwise such parties will be discharged.

In the case of the drawer, notice is *dispensed with* by virtue of Sub-section 50 (2c) if the drawee-banker is under no obligation as between himself and the drawer to pay the bill, or if the drawer has countermanded payment. The effect of this is that the drawer need not be given notice of dishonour if he has no funds at the bank, or if he has stopped payment, or if the banker is relieved of his obligation to pay because the drawer is dead, bankrupt, or insane. But the drawer should at once be given notice if the cheque is dishonoured on technical grounds, as, for example, because it is incomplete or irregularly drawn.



In this connection Sub-section 49 (6) provides that "the return of a dishonoured cheque to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour". Usually, however, the holder of such a cheque should retain possession of the instrument if he has any doubt as to the drawer's integrity or worth, and should forward a separate notice of dishonour in the form suggested in Chapter 17.

### The Return of Unpaid Cheques.

As to what is a reasonable time for giving notice of dishonour is defined in Sub-section 49 (12), quoted in Chapter 17. By virtue of these provisions, a paying banker must *legally* return an unpaid cheque presented by a person residing in the same place (including a banker presenting through the local clearing) in time to reach that person not later than the day following receipt, while he must return a cheque presented by post not later than the day following receipt, or if there is no post on that day, by the first post thereafter. This is the legal position, but it may be varied by the custom and practice of bankers in connection with the local and central clearings, the rules of which must be strictly followed, otherwise the banker may incur liability. In regard to local clearings, it is usually provided that cheques must be paid or returned on the day of receipt, and the same rule operates between the City banks in regard to cheques presented through the Town Clearing. By the Rules of the Clearing House, unpaid Metropolitan and Country cheques must "be returned by post *on the day of presentation* direct to the Bank or Branch Bank whose name and address are on the crossing". Thus, although a country branch has *legally* until the close of the day following presentation in which to pay or return a cheque received in the clearing, the recognised practice of bankers requires that unpaid cheques must be sent off *on the day of receipt*, and this rule must be obeyed.

This principle does not, however, apply to cheques presented *direct* by post, in which cases the paying banker may exercise his legal right to return unpaids by post on the day following receipt. In practice, however, such cheques are returned on the day of receipt, and a paying banker holding a cheque over until the next day would, as a matter of courtesy, advise the presenting banker of the fact. Similar remarks apply in the case of cheques presented for payment by another customer of the same branch, for although the banker has until the close of the following business day in which to pay or return the cheque, he would usually return it, if unpaid, on the day of presentation, or advise the presenting customer that it was being held over until the following day.

In connection with the reason for dishonouring a cheque, the Rules of the London Clearing House provide that "No Return

can be received without an answer in writing on the Return why payment is refused". Accordingly, the reason for the return of a clearing cheque unpaid is clearly written on the face of the instrument by the paying banker, this practice applying also to cheques presented through the local clearing. A cheque which is presented by the holder in person must at once be paid or refused payment, unless the banker has very good grounds for postponing payment, as in the circumstances which have previously been referred to. The banker is not, however, compelled to give an answer or reason for dishonour in respect of a cheque which is presented in person by the holder, although it is usual in practice for such a reason to be given in just the same way as if the cheque had been presented through a clearing.

Cheques which are dishonoured on account of the insufficiency of available funds should be marked "Refer to drawer" or "R/D" in preference to "Not sufficient" or "N/S", for, as already stated, the latter answer may be regarded as giving undue information concerning the state of the customer's account. If a cheque is returned on technical grounds, the reason should be clearly stated thereon and the words carefully chosen so that the credit of the drawer may not be affected. As has been pointed out, the banker is entitled to have cheques drawn in clear and unambiguous form, otherwise he cannot reasonably be expected to carry out the letter of the customer's mandate. He is, therefore, justified in returning as irregularly drawn cheques which do not conform to the accepted requirements. On the other hand, if the banker can without difficulty get into touch with the drawer, it is always better to have a mistake rectified or confirmed by the signature or initials of the drawer himself than to return the cheque, for the return usually gives trouble to the holder, to the drawer and to the bank itself.

Particulars of all cheques returned unpaid, together with the answer given, are entered in a special book kept at each branch for the purpose. This record not only provides the banker with a reference in case any queries arise, but also enables him to see at a glance how many cheques of the same customer have had to be returned during a given period.

### **Payment of a Customer's Bills.**

In the absence of an express agreement or of an agreement which may be inferred from long established practice, the banker is under no obligation to pay bills of exchange, other than cheques, which are accepted payable at the bank by the customer, although such an acceptance is in itself a sufficient authority to the banker to pay the bill and to debit his customer with the amount. If there is no credit balance available, the banker, if he so wishes, may regard a bill made payable with him as a request for an overdraft, and he may charge the customer with interest on

any amount paid out in respect of such an acceptance or acceptances.

In practice, however, bankers usually take from their customers an authority on a special form to pay bills which are domiciled with them, the authority embodying an undertaking by the customer that he will not hold the banker liable if it should turn out that the bill or bills bear a forged indorsement or forged indorsements.

If such an indemnity is not given a banker cannot debit his customer with the amount of a bill which has been paid to a person claiming through a forged indorsement, for, as was clearly indicated in the case of *Vagliano Bros. v. Bank of England*, "in paying their customers' acceptances in the usual way bankers incur a risk perfectly understood, and in practice disregarded. Bankers have no recourse against their customers if they pay on a genuine bill to a person appearing to be the holder, but claiming through or under a forged indorsement. The bill is not discharged; the acceptor remains liable, and the banker has simply thrown his money away".

In paying bills accepted by his customer a banker is outside the protection afforded by the Bills of Exchange Act, 1882. Moreover, the payment of bills does not arise out of the ordinary relationship of banker and customer, and in assuming this duty, a banker merely undertakes the work of an agent acting on behalf of a customer. As an agent he must pay in good faith without negligence and in the ordinary course of business. This means that payment must be made in the usual banking hours on a business day, in accordance with the usual banking practice, and to the lawful holder or his known agent. The bill must be examined to see that it is correct as to form, that all indorsements are complete and in order, that the acceptor's signature is genuine, that the bill is properly stamped, and that it is not overdue. Furthermore, payment must not be made if the acceptor has given the banker instructions not to pay, or if the banker's authority to pay is revoked by reason of the death, bankruptcy, or insanity of the customer.

It is, of course, imperative that the banker should be entirely satisfied with the signature of the acceptor, for if the signature turns out to be forged he cannot debit his customer and must bear the loss himself, subject to the proviso, already discussed in connection with forged signatures on cheques (see *ante*, page 310), that a customer will be estopped from denying the validity of his signature if he has induced the banker to rely upon a signature which is forged or unauthorised.

As a general rule, a banker should not pay overdue bills without a definite authority from his customer, although he would be quite justified in making such a payment if he has sufficient funds available in his hands.

In most other respects the conditions governing payment of

bills on behalf of a customer are similar to those applicable to the payment of cheques. Thus, bills bearing material alterations should not be paid unless the alterations are confirmed by the drawer, and if, after acceptance, a bill is fraudulently altered in respect of its amount, the acceptor cannot be held liable, except for the original sum, and the banker paying the bill would be compelled to bear any loss which might ensue. Again, a banker by undertaking to pay bills domiciled with him does not, in the absence of express agreement, accept responsibility for any documents which have to be received from the holder in return for the payment.

In no circumstances would a banker be wise in undertaking to pay bills domiciled with him by a person who is not a customer. Nor should a banker undertake to remit by post cash or a draft in exchange for a bill domiciled with him. In such a case the holder should be required to present the bill for payment at the branch of the bank at which it is domiciled, either personally or through his known agent, or through another banker.

### Bills to be Retired.

Bankers with whom bills are domiciled are sometimes requested by their customers to pay the instruments before they actually fall due, the instructions being given on a special "Bills to be Retired" form, which is signed by the customer and sets forth details of the bills concerned. A bill paid in such circumstances is said to be "retired" or withdrawn from circulation. The arrangement not only permits the acceptor to discharge his liability on the bill as soon as he has the necessary funds available, but also enables him to obtain possession of any documents of title to goods which may be attached to the instrument, and which are deliverable only on payment of the amount of the bill.

As a rule, payment of a bill before its due date is made *under rebate*, i.e., the acceptor is allowed a deduction from the amount of the bill equal to the interest on that amount for the unexpired period which the bill has still to run before maturity. Such interest is calculated at  $\frac{1}{4}$  per cent. per annum above the current rate allowed on short deposits by the London joint-stock banks, and a receipt in the following form is indorsed on the back of the bill:—

Received payment of the within bill from the acceptor, James Brown,  
this 17th day of September 19... , under rebate at  $4\frac{1}{4}$  per cent. per annum.  
per pro. The Northern Bank, Ltd.,  
William Robinson,  
Manager,  
Northtown Branch.

As a bill of exchange is not paid in due course until it is paid "at or after maturity" (Section 59), a retired bill is not dis-

charged and must not be cancelled by the holder, or by the banker who pays it on behalf of the customer. On receipt from the holder the bill should merely be handed to the acceptor or kept at the bank pending receipt of his instructions.

### Money paid by Mistake.

The *general* rule of law is that a mistake by one party to a contract will not enable that person to set aside the agreement. But to this rule there are certain exceptions, and if a person enters into a contract under a mistaken idea as to the *nature* of the contract, or as to the *identity* of the subject-matter or of the other party to the contract, then the contract may be set aside or avoided by the person who laboured under the mistake. But a mistake will *not* operate as ground for avoiding a contract if the mistake is one of *law and not of fact*, for all persons are presumed to have knowledge of the law of the land.

This was illustrated by the case of *Holt v. Markham*, 1923, where Holt & Co., the army agents, overpaid £744 into Markham's account under a misapprehension concerning the Army regulations and Markham's status as an officer. It was held that Holt & Co. could not recover, for not only had they paid the money under a *mistake of law*, but they had also maintained silence for so long (two months) that Markham had been led to rely on the accuracy of the entries in his account and had acted accordingly.

Moreover, in order that money paid by one person in mistake of fact may be recoverable from the recipient, it must be clearly shown that the mistake was one of fact *between the payer and the receiver* of the money, and that the *mistake arose out of the actual transaction* between those persons. Thus a banker cannot recall a payment because of a mistake of fact as between himself and the drawer of a cheque or the acceptor of a bill. So that a banker who discovers, after paying a cheque, that the drawer has no funds in his account, cannot recover the money from the holder, even if the latter has not left the bank premises, for the mistake is one between the banker and his customer *and not between the banker and the holder*. This statement assumes that the holder in receiving the money acts *in good faith*, but if, for example, the holder was aware that he was not entitled to the money, the banker would be fully in a position to recover payment.

To this general principle there are two important exceptions. Money paid under a mistake of fact between the payer and receiver cannot be recovered if (i) it was paid to an innocent recipient in respect of a *negotiable instrument*, or (ii) it was paid to and received by an innocent recipient *as an agent* and not as a principal, and the agent, before receiving notice of the mistake, has transferred the money to his principal or otherwise prejudiced his position. The matter of good faith is important, for whether

payment is made on a negotiable instrument or otherwise, if the person receiving the money acts in *bad* faith or with a knowledge of the facts, he cannot retain the money as against the payer. The following remarks therefore apply to cases in which the recipient acts innocently and in good faith.

In regard to payments by mistake on negotiable instruments the general rule of law is based on the principle enumerated in *Cocks v. Masterman*, 1829, that the holder of a bill or cheque is entitled to know on the day when it becomes due whether it is honoured or dishonoured, so that if he receives the money and is allowed to retain it for the whole of that day, the payer cannot reclaim the amount from him. The right of a holder to have an immediate and conclusive answer respecting the fate of a bill is one of the essential elements of negotiability and is imperatively demanded by the exigencies of business. It follows, therefore, that, as stated by Mathew, J., in the case quoted, "If the mistake is discovered at once, it may be that the money can be recovered back; but if it be not, and the money is paid in good faith and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back". By virtue of this judgment, it is not necessary for the holder of a bill to prove that, by reason of the delay, he has lost his right to give notice of dishonour to prior parties, although it would seem to be an additional reason why he should not have to repay.

A banker who pays a bill or cheque under a mistake as to the identity of the receiver, or under the mistaken impression that the signature or the indorsement to the instrument is genuine, pays under a mistake as between himself and the person receiving the money. Accordingly, if the person receiving the money acts in good faith, the banker cannot recover unless the money is at once demanded back, and even then he cannot do so if the position of the recipient would be prejudiced, as, for example, where he receives the money as an agent and has paid it over to his principal before receiving notice of the mistake. It must be remembered that this principle applies equally where the money is paid over the counter to the holder of the instrument or is paid to a collecting banker either in cash or through the ordinary clearing channels. In such circumstances the collecting banker can refuse to refund on the ground that his position has been altered by reason of having paid the money to the customer before it was reclaimed, or on the ground that as an agent for his customer he could not be called upon to return money paid away to his principal. This defence would be available to the collecting banker where the forgery was that of an indorsement or of the drawer's signature on the face of the cheque, and in the latter case the court would no doubt hold the paying banker guilty of negligence or lack of sufficient care by virtue of having

paid away money against a signature which was not that of his customer.

Whether money paid by mistake can be recovered from an agent who received it on behalf of a principal is largely a question of fact as to whether the agent's position has been changed or whether he has paid over the money to his principal. And the person receiving the money must *act as an agent* for the principal, so that if it can be shown that money was paid to a person as a principal and not as an agent for another, that person will be liable to refund the amount if he is given notice within a reasonable time and before his position is otherwise altered. And the mere fact that an agent has a lien or set-off in respect of funds of his principal which pass through his hands, does not entitle him to retain money paid to him by another under a mistake of fact, so long as the position of the agent has not otherwise been altered. Lien or set-off can be applied only in respect of property of the customer, but money received under mistake of fact is not property of the customer.

These principles were brought out in the case of *Kleinwort v. Dunlop Rubber Co.*, 1907, where Dunlops paid £3000 to Kleinworts under a mistaken impression that they were to receive the money as agents for one Kramrisch. Kramrisch was being financed by Kleinworts, who applied the money in reduction of an overdraft standing in his name. In giving judgment, Lord Atkinson pointed out, "The authorities . . . seem to establish that whatever may in fact be the true position of the defendant in an action brought to recover money paid to him in mistake of fact, he will be liable to refund it if it be established that he dealt as a principal with the person who paid it him. Whether he will be liable if he dealt as an agent with such a person will depend on this: whether, before the mistake was discovered, he had paid over the money he received to the principal, or settled such an account with the principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund". Dunlops were, therefore, held entitled to succeed on the ground that the position of Kleinworts had not been altered to their detriment.

Again, in *Kerrison v. Glyn, Mills & Co.*, 1912, Kerrison paid money to the account of a customer at the bank under a mistake of fact as between him and the customer. In the action for the recovery of the money by Kerrison, the bank set up the defence that they had a lien on the money as it had been received into an account whereon the customer owed them a much larger sum. But it was held that the existence of a lien between the bank and their customer did not affect the fact that a mistake had been made as between the customer and a third party, so that Kerrison was allowed to succeed and obtain repayment of the money. And "the fact that the banker has little or no chance of getting out of the customer the money he has to refund does not enter

into the question of whether he has prejudicially altered his position in reliance on the payment in".<sup>1</sup>

Similarly, in a later case, *Admiralty Commissioners v. National Provincial, etc., Bank*, 1920, the Commissioners paid a total of £440, in monthly amounts, to the account of an officer at the bank, and in ignorance of his death. On the discovery of the officer's death, the Commissioners sued the bank for the recovery of the £440 paid in mistake of fact. It was held that they must succeed, as the position of the bank as agents of their customer had not been affected. If, however, the bank had paid out the money to the officer's personal representatives, the Commissioners could not have obtained a refund of the amount.

Finally, it should be noted that even if the circumstances are such that the banker should otherwise be allowed to recover, his right of recovery is lost if he has been negligent in making a payment and if the person receiving the money would suffer by reason of that negligence if the banker was allowed to recover, or if the negligence is so gross or reckless that it would be unreasonable to expect that the money should be recoverable from a person who was absolutely powerless to prevent the loss, although the banker could have done so if he acted with reasonable care. If, therefore, a banker shows real carelessness in making a payment or neglects ordinary business precautions, he will generally be prevented from recovering from a holder who has acted in perfect innocence of the mistake, even if the position of that holder has not otherwise been altered.

<sup>1</sup> Paget, *Law of Banking*, 3rd edn., page 480.



## CHAPTER 15

### THE COLLECTION OF CHEQUES AND BILLS

As a general rule, a banker who collects the proceeds of cheques, bills, and other documents is in the position of an agent acting on behalf of his principal—the customer, and “as his customer’s agent in the matter, the banker is bound to use reasonable skill, care, and diligence in presenting and securing payment of drafts entrusted to him for collection and in placing the proceeds to his customer’s account, or in taking such other steps as may be proper to secure the customer’s interests”.<sup>1</sup>

The actual extent of the banker’s duty as a collecting agent will depend upon the facts of each particular case and upon the recognised practice in the circumstances, but he will in any case be liable to his customer for any loss or damage which may result from his negligence or omission to use reasonable care, skill, and diligence in the discharge of the duty entrusted to him.

#### Banker Collecting on his Own Behalf.

In addition to collecting cheques and other instruments on behalf of his customer, a banker is sometimes placed in the position where he is regarded as collecting such documents on his own behalf, as, for example, where he has cashed open cheques over the counter, or where he is collecting the proceeds of cheques specifically paid in to reduce a loan due to him, or where he is collecting cheques against which he has already permitted his customer to draw, although the proceeds have not actually been received.

In such circumstances (assuming, of course, that he acts in good faith) the banker becomes “a holder in due course” of the instrument collected (see *ante*, page 215), and is legally regarded as collecting the proceeds for himself, although such proceeds ultimately rest in the customer’s account. When he collects merely as an agent, the banker is in the position of a “holder” (see *ante*, page 214), from the fact that he is technically the bearer of instruments which either originally or by indorsement are payable to bearer. But in no case does he become liable on the instrument itself unless it is signed by him or upon his behalf.

Where he is acting on behalf of a customer or on his own behalf in thus collecting the proceeds of cheques and other in-

<sup>1</sup> Hart, *Law of Banking*, 3rd edn., page 470.

struments, the banker is technically referred to as the "*collecting banker*", but it is only when he is acting as agent for his customer that he incurs any liability to *his principal*—the customer.

### The Collecting Banker's Liability to the Drawee.

In presenting cheques or other instruments for payment, the collecting banker incurs no obligation and is under no special duty towards the person or bank upon whom the instrument is drawn, or to the person or bank to whom the instrument is presented for payment or acceptance. There is no duty imposed on the collecting banker to protect the interest of such persons, and he incurs no responsibility in the event of any loss arising, so long as he acts in good faith and does not give any personal undertaking or make any misrepresentation concerning the documents which he presents. Thus, if a banker presents for payment a bill of exchange and informs the drawee that the documents against which the bill is drawn are in his hands, he incurs no responsibility if the documents are not in order, and is not liable if he does not ensure that they are genuine.

### The Collecting Banker's Liability for Conversion.

In one important respect, however, the collecting banker runs a risk of incurring liability to persons other than the customer for whom he collects, and that is in respect of the common law obligation imposed upon any member of the community in any circumstances to refrain from "*converting*" property belonging to another.

*Conversion* means the wrongful interference with the goods of another, which is inconsistent with the owner's right of possession, and may be constituted by taking, using, or destroying the goods or exercising over them some control which is inconsistent with the owner's right. For the purpose of this definition the term "*goods*" includes a bill of exchange, cheque, or promissory note. From a banker's point of view possibly the most important fact is that the wrong of conversion may be committed, although the person whom it is sought to hold liable *has acted in perfect innocence*, so that immunity from liability in this respect cannot be secured even by the exercise of the utmost care and skill. This liability exists even in the case of a person who is acting merely as an agent for another, for it must be understood that conversion is a *tort* or wrong which renders the person committing it *personally* liable, in addition to rendering liable the principal on whose behalf the agent was acting when the wrong was committed. Nevertheless, the person suing can only recover damages from one party.

Thus, it follows as a general rule of law, that if a banker can be shown to have converted the goods of another, then, however

innocent he may have been, he will be liable to make good the value to the *true owner*. Furthermore, this liability exists quite apart from the banker's relation to his customer, and accordingly it may happen in special circumstances that a banker who is not entitled to debit his customer with a wrongly paid cheque may have to lose twice over.

The remedy of the true owner in respect of conversion of his property is to sue the person converting in an action for conversion, trover, or detinue of the property, and if he succeeds he will be entitled to return of the goods or to damages, together with the costs of the action. In the case of a negotiable instrument, the damages will be the face value of the instrument.

### Money Had and Received.

In an action for conversion of goods or of a negotiable instrument in respect of which money has been received by the person converting, it is usual for the true owner to join with his claim for conversion a claim for "money had and received" to his use, the plaintiff being thus free to recover on either ground. The claim for "money had and received" against a person who had no knowledge of the rights of the true owner is apparently based on an implied promise, which the law imputes to a person dealing with the money of another, to repay that money to the lawful owner when it is demanded.

All actions against a collecting banker are in fact made in this dual form, and, if the facts are proved, it is no defence on the part of the banker to plead that he merely acted as an agent, or that he acted without any hostile or injurious intent towards the true owner, or that he was in complete ignorance that his customer's title was defective.

### When a Banker may be Liable for Conversion.

It will be appreciated that, as the business of a banker involves the frequent handling of goods and instruments belonging to others, he must, in the absence of statutory protection, run considerable risk of liability for conversion. And although he runs the greatest risk of incurring this liability when he is acting as an agent for collection he may, as we have seen in the preceding chapter, incur liability for conversion when he acts as a *paying* banker, by reason of discharging an instrument for some one other than the true owner. Sir John Paget<sup>1</sup> gives the following *five* cases in which a banker may, *in the absence of statutory protection*, render himself liable for conversion:—

1. *Paying a cheque bearing a forged indorsement.* It must be remembered that forgery conveys no title to property in a cheque, and, therefore, payment to anyone who

<sup>1</sup> *Law of Banking*, 3rd edn., page 374.

holds through a forgery is not a payment to the true owner. In regard to this a paying banker, as we have seen, is safe if he can bring himself within the protection afforded by Sections 60 and 80 of the Bills of Exchange Act, 1882. He is also protected by Section 19 of the Stamp Act, 1853, and by Section 17 of the Revenue Act, 1883, in respect of documents other than cheques which fall within those sections.

2. *Collecting a cheque, bill of exchange, or promissory note bearing a forged indorsement, or in respect of which the customer has no title.* So far as bills of exchange and promissory notes are concerned the liability is absolute, but in connection with cheques the banker is afforded protection by Section 82 of the Bills of Exchange Act, 1882, and Section 17 of the Revenue Act, 1883. (See below.)

3. *Paying to a person who holds under a forged indorsement a bill of exchange accepted payable at the bank.* In this case there is no statutory protection even if the bill is payable on demand, for the banker's protection applies only in the case of cheques as distinct from bills.

4. *Accepting as a holder for value a bill of exchange, cheque, or promissory note bearing a forged indorsement, or a cheque crossed "not negotiable" to which the title is void or defective.* Here again there is no statutory protection, for a banker who takes a not negotiable instrument as a holder for value is not protected either as a paying banker or as a collecting banker.

5. *Delivering to the wrong person goods which have been entrusted to him for safe custody.* (See Chapter 25.)

### The Collection of Cheques for a Customer.

In collecting *uncrossed* bearer or order cheques for a customer a banker is afforded no protection by the law, and in the event of such instruments bearing a forged indorsement, or of the customer having no title or a defective title, the banker incurs the ordinary common law liability for converting the property of the true owner, to whom he is liable also in respect of money had and received. In such circumstances, the banker may be able to charge his customer if the payee has received the money; but as has already been stated, the liability for conversion is essentially a personal one, and the fact that a banker acted merely as an agent affords him no protection as against the true owner.

If the banker is collecting *uncrossed* cheques on his own behalf as a holder in due course, he is liable to the true owner only if the cheque bears a forged indorsement, but he can in any case enforce his rights as a holder against any indorsers of the cheque who indorsed after the forgery, and also against his immediate transferor if that person has not indorsed. On the other hand, if the question is not one of forgery, but is merely

one of absence of title or defective title on the part of the person from whom the banker took the instrument, the banker in such a case is a holder in due course with power to enforce payment against all prior parties to the instrument. A banker becomes a holder in due course of an uncrossed cheque when, in good faith and without negligence, he gives cash for the instrument to a customer or third person presenting the cheque for exchange, or where he applies the cheque in reduction of a loan which he has granted to the customer, or where, having credited such a cheque as cash, he permits the customer immediately to draw cheques against the amount.

In regard to *crossed* cheques, whether payable to bearer or order, the banker obtains statutory immunity or protection from his common law liability of conversion by virtue of Section 82 of the *Bills of Exchange Act*, 1882, which provides as follows :—

82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

The provisions of this section are further extended in the banker's favour by virtue of Section 1 of the *Bills of Exchange (Crossed Cheques) Act*, 1906, which reads :—

1. A banker receives payment of a crossed cheque for a customer within the meaning of section eighty-two of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

This act was passed to negative the effect of the Court of Appeal decision in the famous Gordon Case (i.e., *Capital & Counties Bank v. Gordon*, 1903), in which it was decided that, by crediting as cash cheques paid in by a customer, a banker becomes a holder for value and is to be regarded as collecting the proceeds for himself and not for his customer. But it is to be noted that this amendment applies only to *crossed* cheques, and does not therefore affect the banker's position in relation to open or uncrossed instruments.

### Analysis of the Protection Afforded by Section 82.

The object of Section 82 is clearly to protect the collecting banker as against the claims of the true owner of crossed cheques upon which the indorsement is forged or in respect of which the customer has no title or a defective title. But in order to claim the protection the banker must act strictly in accordance with its provisions, although, as Sir John Paget<sup>1</sup> has pointed out, it is doubtful whether any section of any other Act has been so

<sup>1</sup> Gilbert Lectures No. 4, 1916.

twisted, misconstrued, and watered down by legal decisions, with the result that the banker's position is so hedged about with pitfalls and technicalities that the section really affords him but scant protection.

In the first place, he must act "in good faith and without negligence", and this applies to the *whole* transaction, from the receipt of the instrument from the customer to the receipt of the proceeds from the paying banker. As a general rule the question of good faith is not very material, for it is to be presumed that modern joint-stock banks do not act otherwise than in good faith in any of their dealings.

### What Constitutes "Negligence"?

The matter of negligence is, however, one of great importance, for although the question as to what constitutes negligence is a matter of fact to be decided by a jury in view of all the circumstances of the particular case, the term is capable of a very wide interpretation, frequently to the detriment of the banker, who "maintains that the exigencies and pressure of business make it physically impossible to adopt all the precautionary measures which the law would seek to impose upon him".<sup>1</sup> The question of negligence is also of importance, inasmuch as it imposes on the banker a statutory duty to the true owner, although it is a general principle that in their transactions with customers bankers owe no duty to third parties. A banker's duty is to his customer and to no other, and generally speaking there can be no negligence where there is no duty. Nevertheless, a distinct obligation to act with businesslike precaution is imposed upon the banker by Section 82, and unless he so acts he will lose the protection afforded to him by the section: "The assumption of this duty to a stranger must be regarded as part of the price paid by bankers for protection under Section 82" (Paget).

The general test of negligence in the collecting banker, so far as the true owner is concerned, is whether he has acted as a reasonable business man would act in like circumstances if dealing with his own affairs, but the decisions given by the Courts in the present connection appear to place the duty somewhat higher than this, and the ease with which a banker may deprive himself of the protection of Section 82 is clearly demonstrated by the following cases which have been held to constitute negligence in the collection of cheques:—

1. *Omission to verify the correctness of indorsements on cheques payable to order.* The collecting banker must ensure that the indorsements on all cheques presented by him are technically correct and in accordance with the recognised practice, as ex-

<sup>1</sup> Gilbert Lectures, 1916, No. 4.

plained in Chapter 13. Thus in *Bavins, junr., and Sims v. London & South Western Bank*, 1900, the Court of Appeal held that the collecting banker was negligent in not detecting that an indorsement and a signature to a receipt did not correspond with the name of the payee, although the discrepancy had escaped detection even in the lower Court, and although the appeal was based on other grounds.<sup>1</sup>

2. *Omission to notice that indorsements of different payees were in the same handwriting.* Thus in *Turner v. London & Provincial Bank*, 1903, the collecting banker was held to be negligent in not noticing that the indorsements on two cheques payable to different persons were in the same handwriting. This clearly imposes an extreme duty on the receiving cashier, for when cheques are sent to different collections it is difficult to see how any other member of a bank staff can exercise the necessary care.

3. *Omission to verify the existence of authority in the case of per procuracion signatures.* The collecting banker must see that all indorsements which purport to be signed "per procuracion" are in fact authorised. He must not accept such indorsements unless he is satisfied that the ostensible authority actually exists, while signatures on behalf of limited companies, partnerships, local authorities, and official payees should be accepted only if the banker knows that the signatories *may* have the requisite power to indorse. Particular care is needed with "per pro." signatures because of their indiscriminate use by the general public, and because the banker is "put on inquiry" by the form of the signature, especially in circumstances such as those referred to in Examples 4-6 below.

4. *Collecting for the private account of an official a cheque made payable to his company or firm and indorsed by him on its behalf.* This has been so explicitly maintained as negligence in various cases that a banker should exercise extreme care before accepting for credit of a person's private account cheques payable to a company which he represents, and indorsed by him as agent on its behalf. Thus in *Hannan's Lake View Central, Ltd. v. Armstrong & Co.*, 1900, a bank was held to be negligent in collecting for their customer, Montgomery, cheques payable to the company and indorsed by him "Hannan's Lake View Central, Ltd., H. Montgomery, Secretary"; for although the customer had authority to indorse in that way on behalf of the company, the Court considered the whole course of business was opposed to the idea that he could pay cheques so indorsed into his private account.

This view was confirmed by the Court of Appeal in the case *A. L. Underwood v. Bank of Liverpool and Martins*, 1924, where the sole director of a limited company paid into his private account, over a long period, crossed cheques payable to the

<sup>1</sup> Hart, *Law of Banking*, pages 510-12.

company and indorsed by him on its behalf. The collecting bank claimed the protection of Section 82, and claimed that they were entitled to rely on the ostensible authority of the sole director to deal with the cheques as he had done. The Court held, however, that in view of the strangeness of the director's conduct, the bank was negligent in not making some inquiry, and was therefore liable to make good the amounts to the company.

But, as was pointed out by Mr Justice Mackinnon in *London & Montrose Shipbuilding Company, Ltd. v. Barclays Bank, Ltd.*, 1926, the mere fact that a cheque made payable to a limited company and properly indorsed on its behalf is paid into a person's private account, does not of itself put the bank upon inquiry as to whether the transaction is in order, for if such was the case no cheque negotiated by a company to whom it was made payable could be safely collected by a banker without elaborate preliminary inquiries.

In the *London and Montrose Shipbuilding Company's* case, a cheque payable to the company and endorsed by a director, who had full authority to endorse cheques on the company's behalf, was paid into the private account of *another person*. The company sought to hold the collecting bank liable for conversion on the grounds that the fact that the cheque was payable to the company should have put the bank upon inquiry, *Underwood's* case being cited in support of this contention. The Court held, however, that the bank was not liable, and in delivering judgment, Mackinnon, J., made the following instructive statement :

(Mr Schiller, the plaintiff's counsel) " suggests, with I think almost equal boldness, that wherever the named payee on a cheque is a limited company as distinct from an individual and the cheque has been indorsed to an indorsee by that company, the bank collecting on behalf of that indorsee is put upon some sort of inquiry, and ought to inquire of the company whether the transaction is in order ; and I am asked to go as far as that upon the authority of the decision in *Underwood's* case. I think that is putting it impossibly high. *Underwood's* case was a totally different case. It was no doubt the cheque of a company indorsed by an official of the company and paid into a third party's account ; but that third party was the very official of the company who had been indorsing, and it had been going on for a long time."

5. *Accepting for a customer's private account cheques drawn " per pro. " by him on behalf of his firm and made payable to himself.* Thus in the case of *Morison v. London, County & Westminster Bank, Ltd.*, 1914 (decided, however, on other grounds), the Court of Appeal held that the bank was guilty of conversion in accepting for an employee's private account cheques drawn by him " per pro. " on his firm's account, either at the same



bank or at another bank, the cheques being made payable either to the firm or to the employee himself, and being indorsed by him in his own name or "per pro." the firm, as the cases required. (See also below.)

6. *Collecting for a partner's private account cheques payable to the partnership.* A banker has no right to assume that a partner is entitled to place to his own account cheques payable to the firm, and if a customer desires to do so, the best course is to insist on the cheque being paid to the firm's account and that a new cheque for the amount is drawn in favour of the partner, if possible by another member of the partnership.

7. *Placing to a customer's private account cheques payable to him in an official or fiduciary capacity.* This applies where there is clear evidence on the face of the cheque that it is paid to the customer in an official or fiduciary capacity, as, for example, to "Thomas Robinson, Collector of Taxes"; or where the cheque is clearly intended for an official account, as, for example, when it is payable to "The Collector of Taxes", "The Collector of Inland Revenue", "Borough Rates", "Water Rates", etc. In no circumstances should cheques so payable be accepted for a private account, but unless the circumstances are very suspicious, a banker is not justified in querying the payment-in to a private account of cheques drawn in favour of a person who holds one or more official or fiduciary positions. The mere fact that a person is a public official, or that he acts in a fiduciary capacity which involves his having other people's money in his hands, does not of itself put the banker on inquiry.

8. *Omission to obtain a reference from a new customer, or to follow up a reference given by a customer on opening an account.* Thus, in *Ladbroke v. Todd*, 1914, the bank was regarded as negligent for not having obtained a reference, while in *Turner v. London & Provincial Bank*, 1903, it was accepted as proof of negligence on the part of a bank that it did not take up a reference which was given by a new customer. In the former case a crossed cheque drawn by A in favour of X was stolen from a pillar-box by C. C forged X's indorsement, impersonated him, and opened an account at a bank with the stolen cheque. The bank made no inquiries as to C's position or character, and was accordingly held to have been negligent and therefore liable to the true owner, A, for the amount of the cheque.

9. *Taking a cheque crossed "Account Payee" for other than the payee named.* The words "Account Payee" or "Account payee only" or "Account James Brown, etc." have no statutory recognition, but they are now sufficiently recognised in practice and by the Courts as to render liable for negligence a banker who disregards them and collects a cheque bearing the words for some one other than the payee named. (*Morison v. London, County & Westminster Bank*, 1914; *Sutters v. Briggs*, 1922.) (See also page 363, *ante*.) This applies even though the cheque

be made payable to the named payee or bearer. Thus, in *House Property Co. of London v. L., C. & Westminster Bank, Ltd.*, 1913, a cheque was drawn payable to "T., C. and others, or bearer, a/c payee". (T., C. were trustees of a fund.) The cheque was sent to the trust solicitor, who fraudulently paid it in to his own account at the A. bank, where there was no account of the trustees. It was held that the bank in collecting the cheque was *prima facie* guilty of conversion of the cheque, and in the absence of inquiry as to the customer's authority to receive payment on his own account of a cheque so drawn, was not protected by Section 82 of the *Bills of Exchange Act, 1882*.

### Collecting Cheques crossed "Not Negotiable".

The question has also been raised as to whether a collecting banker is guilty of negligence within the meaning of Section 82 when he collects for some one other than the payee a cheque crossed "Not negotiable". The point has not actually been before the Courts, although certain judges have expressed views which seem to indicate that they would regard as negligence the collection of "Not negotiable" cheques for a person other than the payee. On the other hand, Sir John Paget expresses the opinion that the banker in such circumstances could not be accused of acting negligently in the interests of the true owner, for apart from the fact that the negligence referred to by Section 82 "must mean negligence independent of anything which simply goes to constitute a crossing", the words "Not negotiable" do not in themselves limit the transferability of the cheque. Moreover, their legally recognised effect is to operate as a warning to transferees that they will be affected with any defects of title, but this effect ceases when such a cheque once reaches the hands of the collecting banker, who is not usually in the position of being a transferee of cheques in his hands for collection.

### Estoppel as against the True Owner.

It may be noted that, in certain circumstances, a banker may escape liability for negligence on the ground that his acts or omissions have been induced or encouraged by the action or inaction of the true owner, who is thereby estopped from succeeding against the bank on the grounds of conversion. This was the case in *Morison v. London, County & Westminster Bank*, 1914, where an employee, Abbott, had for years fraudulently paid into his private account cheques drawn by him "per pro." on behalf of his firm, Bruce, Morison & Co. Some of the cheques were made payable to himself, some to "Selves or order", and some to the firm, the cheques in the last two cases being indorsed by him "per pro." the firm. The employer, Morison, had actual knowledge of some of the misappropriations, but took no steps to

warn the bank, or to complain of the transactions, in spite of the fact that he had from time to time received his pass book. The Court held that by his conduct and by withholding all information from the bank as to the employee's improper dealings with the cheques, the plaintiff (i.e., the true owner) must be held to have adopted the cheques and was, therefore, not entitled to succeed against the bank, in spite of the fact that it was technically guilty of conversion of all the cheques and of negligence in placing them to the employee's private account. The circumstances of this case were exceptional, but it made clear the fact that there is a limit beyond which the Courts will not raise the standard of care which a banker is supposed to exercise in the interests of a person to whom he owes no duty apart from that imposed by Section 82.

#### “Receives Payment for a Customer”.

In order to obtain the protection of Section 82 the banker must act throughout simply and solely *as an agent for his customer* in collecting the cheque and receiving payment of the proceeds; but by virtue of the Bills of Exchange (Crossed Cheques) Act, 1906, already mentioned, the banker is not deprived of the protection merely because he has credited the amount of a cheque in process of collection to the customer's account before the proceeds have actually been cleared.

The protection will not, however, apply if there are circumstances indicating that the banker is not acting *on behalf of a customer*, as, for example, where he is collecting a cheque of which he is himself the holder for value by reason of having cashed the cheque for a customer or a stranger, or of having explicitly accepted a cheque in reduction of an overdraft, or of having expressly or impliedly agreed to allow the customer to draw against credits as soon as they are paid in, without reserving the right to refuse payment of cheques so drawn. But a banker does not become a holder for value merely because he credits cheques to an account before he receives the proceeds, for, in the absence of agreement, such entries do not empower the customer to draw at once, nor do they affect the banker's right to return cheques drawn against uncleared items. (*Underwood v. Barclays Bank*, 1924.)

The collecting banker cannot be regarded as a holder for value unless he becomes the actual *transferee* of the cheque. Examples of circumstances where this may arise are as follows:—Thomas Robinson asks his bankers to cash a cheque for £10 drawn by him or by some one else on another bank. If the bank complies, it becomes the transferee or holder for value of the cheque and loses the protection of Section 82. It makes no difference whether the cheque is crossed or uncrossed, or whether Thomas Robinson signed an “Exchange form” or not, the banker will be liable to the true owner if the cheque is being converted.

Again, Thomas Robinson having no balance to his credit, asks his banker to cash for him a crossed cheque for £5 drawn on another bank. The cashier suggests that the better plan would be to place the cheque to the account, and for the customer to draw his own cheque for encashment. This is done, but nevertheless the bank is not protected, for it must be regarded as having purchased or given value for the crossed cheque on the other bank, and will accordingly be liable to the true owner if the customer's title is defective.

Take the case, too, where Thomas Robinson has an overdraft of £100 at his bank and, being pressed to effect a reduction, pays in a crossed cheque for £30 which bears a forged indorsement. The bank will be liable to the true owner for having taken the cheque as holders for value, and for having converted his property or for having in their possession money had and received on his behalf. Finally, a banker becomes a holder for value and cannot be regarded as collecting for a customer if he takes a cheque from a stranger and promises to collect the proceeds for him.

Unfortunately there is no strict definition in the Bills of Exchange Act or elsewhere as to what constitutes "a customer" for the purposes of this section, and therefore the matter must be decided in accordance with recognised practice and custom. Undoubtedly, a person is a customer who has some sort of an account with the banker, whether it is a current, deposit, bills discounted account or a deposit receipt. But it must nevertheless be remembered that in *Ladbroke v. Todd*, 1914, it was decided that *one* transaction was sufficient to constitute a person a customer, so that a banker would be rightly regarded as acting for a customer in collecting cheques representing the first credit by which an account was opened. A person does not, however, become a customer merely by calling at a bank from time to time to cash cheques drawn in his favour, as was the case, for instance, in *G.W. Rly. v. London and County Bank*, 1901, where a man named Huggins had for years been in the habit of cashing cheques of the Railway Company at the bank, although he had no account or pass book with them. It was held that Huggins was not a customer within the meaning of Section 82. The bank was therefore liable to the true owner.

Furthermore, "it is conceived that a person who has an account at a branch is a customer, not only of the branch, but of the bank as a whole within the meaning of the Section".<sup>1</sup> If this view is accepted, a banker escapes liability to the true owner by virtue of Section 82 when one branch collects crossed cheques on behalf of a customer of another branch or of the head office. This protects a bank in respect of crossed cheques which form part of a credit paid in by a person for transfer to his account at another branch of the same bank. But this protection does not extend to cheques included in credits for customers of *other banks*, in

<sup>1</sup> Hart, *Law of Banking*, page 513.

respect of which the collecting banker is liable to the true owner, although he would no doubt be indemnified against loss by the banker for whom the credit was accepted.

If the banker is not collecting for a customer, then he must be regarded as collecting for himself as a holder for value, but some difficulty arises in connection with the subject of *banker's lien* (see Chapter 22). A banker has a lien on all cheques, bills and notes of his customer which come into his hands in the ordinary course of business in respect of any loan or overdraft owing to him by the customer, and by virtue of Section 27 (3) of the Bills of Exchange Act, any holder who has a lien on a bill or cheque is deemed to be a holder for value to the extent of the sum for which he has a lien. What therefore is the position of a banker who collects cheques in respect of which he is deemed to be a holder for value by reason of his having a lien over them? The question remains to be decided by the Courts, but in the opinion of Sir John Paget, the fact that a banker has a lien over a cheque does not warrant his being deprived of the protection of Section 82 on the grounds that he is a holder for value and not an agent for his customer. A person who has a lien must be regarded as a holder for value only in a restricted sense, for the existence of such a right does not convey any actual *property* in the instrument subject to the lien. Moreover, the enforcement of the lien in respect of the proceeds of any particular bill or cheque is a purely optional matter; the proceeds of cheques are received by the banker for a customer, *subject to* his right of lien over those proceeds if he chooses to exercise it. Thus, if Thomas Robinson's account at the Northern Bank is overdrawn £20, and he pays in a crossed cheque for £190, the bank will have a lien on the cheque but is nevertheless properly regarded as collecting the proceeds for its customer, subject to its right to retain £20 of such proceeds if it chooses to exercise that right.

### The Document must be a Crossed "Cheque".

As the section specifically mentions the word "*cheque*", the banker will not be protected unless the instrument collected conforms in all respects with the essential requisites of a cheque which we have previously discussed. Accordingly, the section would not apply to drafts on demand drawn by a branch on its head office, or *vice versa*, for such documents do not comply with the requisite that a cheque must be drawn by a *customer on a banker*.

Nevertheless, the banker is protected in respect of documents *issued by customers* which are not strictly cheques, by virtue of the provisions of Section 17 of the Revenue Act, 1883 (see page 332, *ante*). This section extends the protection of Section 83 to conditional orders to pay bearing a general or special crossing, but in order to obtain the protection the instrument concerned

must not bear any evidence of transfer, for, as is pointed out on page 332, Section 17 of the Revenue Act specifically provides that nothing contained therein shall be deemed to render any such document a negotiable instrument.

If, therefore, a banker undertakes to collect conditional orders to pay bearing more than one indorsement, he will do so entirely at his own risk, for in the event of the presenter having no title or a defective title, or in the event of an indorsement being forged, the collecting banker will be deemed to have acted with negligence by reason of having accepted for collection a not transferable instrument which bears evidence of negotiation.

By virtue of Section 95 of the Bills of Exchange Act, the term "cheque" as used in Section 82 is to be taken to include a warrant for the payment of dividend, and accordingly a banker would be protected by Section 82 in respect of his collection of such a document. It must not be assumed, however, that the extended protection given by the Bills of Exchange (Crossed Cheques) Act, 1906, applies to a dividend warrant, for this Act by its terms applies to cheques only. Accordingly a banker who credits dividend warrants as cash before collection would not be freed from liability if it should turn out that they had been converted.

Furthermore, it must be remembered that Section 95 applies only to *dividend* warrants, and accordingly the crossed cheque sections of the Bills of Exchange Act cannot be regarded as applying to *interest* warrants, as, for example, those which are issued by the Bank of England in payment of interest on the War Loans.

### **The Cheque must be Crossed generally, or specially to the Collecting Banker.**

The protection of Section 82 cannot be obtained unless the cheques collected are crossed generally, or specially to the collecting banker, when they come into the hands of the bank seeking the protection of the Section, and it is not sufficient for this purpose if the collecting banker crosses the cheques himself in accordance with his rights under Sub-sections 77 (5) and 77 (6) of the Bills of Exchange Act. If, therefore, the collecting banker wishes to evade liability to the true owner in respect of conversion, he must ensure that all cheques for collection are crossed before they are paid in by his customers, who, it will be remembered, have authority as holders to cross cheques either generally or specially, or to add the words "Not negotiable" to an existing crossing. Some bankers endeavour to safeguard themselves by inserting a notice in their pass books or paying-in slip books requesting customers to cross specially to the bank any cheques paid in for collection, and if this was done in all cases the position of the collecting banker would be made reasonably secure.

Generally speaking, the protection of the section applies in the

case of a cheque bearing a "Not negotiable" crossing, as it does in the case of an ordinary crossing, but while the existence of a "Not negotiable" crossing does not make the cheque "Not transferable" so as to preclude the banker from collecting for anyone other than the payee, the fact that he had collected a "Not negotiable" cheque bearing more than one indorsement *may* not operate in his favour if there were other attendant factors which should have aroused suspicion.

### Cheques Crossed "Account Payee" or "A/c Payee Only".

It would, however, be regarded as conclusive evidence of negligence on the part of a collecting banker if he collected for anyone other than the payee a cheque bearing on its face the words "Account Payee" or "Account Payee Only" or "Account so and so", for although these words have no statutory recognition, they have nevertheless been so long recognised in practice and in the Courts that it would be impossible for a collecting banker to justify the fact that he had ignored their existence. Furthermore, in the case of *Akrokerrri (Ashanti) Mines, Ltd., v. Economic Bank*, 1904, the judge considered that such an addition to a crossing on the face of a cheque constituted a direction to the receiving banker as to how the proceeds of the instrument were to be dealt with *after receipt*. This clearly implies that the cheque can be taken and collected only for the named payee, and would apply as much in the case of a cheque payable to a named payee or bearer, as it would in the case of an instrument payable to order. (See page 357, *ante*.)

This view was confirmed by the Court of Appeal in *Underwood v. Bank of Liverpool & Martins*, 1924, Lord Justice Scrutton, in the course of his judgment, stating: "While this addition (i.e., 'Account Payee only') does not affect the negotiability of an order or bearer cheque, I agree with the view of Mr Justice Rowlatt that, when such a cheque is paid into the account of a person who is not the payee, the bank is put on inquiry".

### Not Transferable Cheques.

A collecting banker would clearly obtain no protection if he collected for anyone other than the payee a cheque which by its terms was made "not transferable" in accordance with Section 8 (1) of the Act, as, for example, where it was drawn "Pay John Smith *only*". In collecting the proceeds of such a cheque the collecting banker must see that they are received by the named payee, and as evidence of this he is required in practice to confirm the indorsement of the payee with his own stamp and signature.

### "Not Liable to the True Owner".

The liability here covered means any liability which the collecting banker might incur in an action by the true owner for

conversion, or for money had and received, or for any other reason. The true owner of a cheque, as has been previously indicated, is the person who is entitled to or interested in its proceeds, and freedom from liability to the true owner implies that the banker is secure from all claims which may be made by or on behalf of any other parties.

### The Meaning of "Collection".

Section 82 does not specifically refer to the term "collection", but provides that the banker collecting a cheque is not liable "by reason only of *having received such payment*". Nevertheless, the words in italics may be regarded as covering all the steps which must be taken by a banker in presenting cheques for payment and in conveying the proceeds to the customer's account.

As in the case of payments made by the banker himself, the proceeds of a cheque may be received either in cash paid over the counter by the banker on whom the cheque is drawn, or merely by book entries between the paying banker and the collecting banker, or merely by entries in the books of the collecting banker himself. The last case applies when cheques drawn by one customer of a branch are paid in by another customer, in which circumstances the banker receiving the credit is both a collecting banker and a paying banker. As a collecting banker he must exercise just as much care over the transaction as if he were collecting cheques drawn upon another bank, and he must not let his duties as a paying banker and a collecting banker conflict.

In the capacity of a collecting banker, he need not at once return a cheque as unpaid if the funds of the drawer do not justify payment, for he is legally allowed up to the close of business on the day following receipt of a cheque *from a customer*, to decide whether he will pay it or return it. In practice, however, bankers return unpaid cheques on the day of receipt (even when they are *not* presented through the clearing), so that if the banker decides to exercise his legal rights as a collecting banker in order to give the drawer an opportunity of providing the necessary funds, he should give advice of the fact to the customer by whom the cheque was presented and also inform the drawer that the cheque is being held over in anticipation of a credit. The banker's right to return a cheque after thus holding it for a day is in no wise affected by the fact that he may have acknowledged receipt of the credit to the customer from whom the cheque was received.

In the collection of cheques drawn on other banks, a banker usually makes use of the *local clearing* in the case of cheques drawn on banks in the same place, or of the *London clearing* in the case of cheques drawn on banks in other parts of the country. Cheques on banks in other towns may also be presented *direct*, or



through a branch or agent of the presenting bank in the town concerned. In any case the banker is permitted to make use of the post for the presentment, whether that presentment is made direct through one of his own branches, through a correspondent, or through the clearing house. But in all cases where presentment by post is adopted, the collecting banker must act strictly in accordance with recognised banking practice, otherwise he may be involved in liability on the grounds of negligence.

Cheques are not usually presented direct unless the banker is expressly requested to do so by the customer from whom the cheque is received, or unless the amount is above the sum which is agreed between the banks as the limit in the amount of any one cheque presented through the ordinary clearings, or unless the cheque is one which has been previously dishonoured for technical or other reasons.

Wherever possible, articles to be presented direct are forwarded to the local branch of the collecting bank, but if no such branch exists in the relative place, the articles are sent to a local branch of another bank which acts as agent in such matters for the collecting bank. As a rule, in the case of articles thus presented direct, a prepaid telegram or post card is enclosed with a request to the paying banker to advise the "fate" of the instrument, i.e., whether it is paid or unpaid.

Settlement in respect of items thus presented is effected by means of what are known as *Agency Arrangements*, i.e., standing agreements between the banks concerned whereby they mutually undertake, on certain terms as to commission, etc., to collect cheques and bills and to receive credits on behalf of each other, and to cash cheques of each other's customers under advice. The debits and credits arising out of such transactions are passed through the relative agency accounts at the respective head offices, the banks concerned maintaining current accounts with each other for the purpose. The specimen form of Transfer Sheet on page 83, *ante*, indicates the method of passing the entries.

If no such agency arrangements exist, settlement of transactions of the kind referred to, and also of the balances arising from the local clearings, are effected by "banker's payment", i.e., an order by a branch instructing its head office to pay over a specified sum to another bank on account of one of its branches. The payments are settled by being included in the Town clearing of the day of receipt by the head office. They do not require a revenue stamp.

### The Local Clearing.

Local clearings are conducted between the banks in all towns where more than one bank is represented with the object of conveniently exchanging cheques drawn by their respective

customers. In the majority of towns the clearings are conducted without any formality at one or two fixed times during the day, when clerks from the respective banks call on each of the other banks to present certain cheques and to receive cheques drawn on the bank of the presenting clerk. The totals of the cheques presented are agreed, and at the end of the day the net balance owing to or by each bank is settled in accordance with recognised arrangements by a transfer through the respective head offices.

In certain large provincial centres specially organised clearing houses exist for the convenient carrying out of these exchanges, the principal local branch of each bank acting as a local clearing agent for all branches of that bank in the clearing area, receiving cheques on all other banks for exchange and distributing among the branches cheques drawn thereon and received from the other banks, each branch being debited or credited accordingly through the head office. The net balance owing to or by each bank in respect of the local clearing is settled by transfer through the clearing house account at the local branch of the Bank of England. Such provincial clearing houses exist at Birmingham, Bristol, Hull, Leeds, Leicester, Liverpool, Manchester, Newcastle-Tyne, Nottingham and Sheffield.

The collecting banker must present for payment cheques drawn on a bank in the same place not later than the business day following that upon which the cheque is received. As a general rule, such cheques are presented wherever it is possible on the day of receipt, but cheques which are received too late for presentation on that day must be held over until the following day.

Omission by the collecting banker to present and collect local cheques in accordance with the recognised customs governing the local exchange will amount to negligence sufficient to deprive him of the protection which he is afforded by Section 82, but it will, of course, rest upon the party seeking to hold the banker liable to prove that he has not acted in accordance with the recognised practice.

### **The London Clearing House.**

By far the greater portion of cheques drawn on bankers in this country are presented and collected through the London Clearing House in Post Office Court, Lombard Street. The clearing was originally established in 1775 between the London private bankers, and it was not until 1854 that the joint-stock banks, who are now the only members, were admitted. The general principle of the clearing is that cheques drawn upon the branches of the eleven clearing banks, and also the majority of bills payable at those branches, are brought into one central dépôt where they are exchanged by the respective head offices. Settlement of the "differences" owing to or by each bank is

effected by transfers between the accounts of the clearing bankers which are kept at the Bank of England.

As the great majority of commercial transactions in this country are settled by cheque or bill of exchange, it will be appreciated that a vast number of articles must pass through the Clearing House, and that the totals of the transactions reach a stupendous figure during the course of a year. At the same time, it will be understood that the clearing system not only effects a great economy in the work of the banks, but also permits commercial transactions to be settled with a minimum of expense.

The London Clearing is divided geographically into three sections: (a) *The Town Clearing*, which embraces all banks in the central London or City area around the Bank of England, and therefore includes the head offices of most of the banks; (b) *The Metropolitan Clearing*, embracing all banks and branches outside the town clearing, but within an area roughly corresponding to the London postal district, i.e., within a radius of about four miles; and (c) *The Country Clearing*, which was established in 1858 and deals with cheques only on those branches and correspondents of the clearing bankers which are outside the range of the other two collections.

Although the Country clearing deals only with cheques, both cheques and bills are collected through the Town and Metropolitan clearings. For convenience in sorting and in order to avoid confusion, cheques belonging to the three groups are distinguished by the letters "T", "M", or "C" printed in the left-hand bottom corner.

### The Town Clearing.

Two town clearings are held each day, one at 10.30 a.m. and the other at 2.30 p.m. The former consists primarily of the exchange between the clearing banks of "bundles of charges", i.e., cheques and bills drawn upon the respective town offices, which have been received by the morning post from branches and correspondents in the country, or which were received at the City offices on the previous day too late for presentation through that day's Town clearing. The larger town clearing takes place between 2.30 and 3.50 p.m. (Stock Exchange settling days, 2.30 to 4.5 p.m.), and covers cheques and bills received at the various City offices of the clearing banks during the day, and also cheques received from Metropolitan and suburban branches for special presentment.

The cheques and bills on other banks which each head office receives from its branches and correspondents are listed on separate sheets for each clearing bank. On receipt, these lists are agreed and their totals are machined or entered in a special "Out-Clearing Book" under the names of the respective banks,

a grand total of the charges to be presented to each of the other clearing banks being thus obtained.

These cheques and bills—referred to as the presenting bank's "Out-clearing"—are taken to the Clearing House by the "out" clearing clerk, by whom they are sorted according to banks and handed to the "In-clearing" clerks of the banks concerned. The cheques and bills which each bank thus receives from all the other banks are collectively described as that bank's "In-clearing", and upon receipt, the amounts are machined and the totals relating to each bank verified with the total supplied by that bank's "out-clearer". These totals are then carried to the settlement sheet in the manner described below.

The cheques received by each "in-clearer" are taken to the relative head office for sorting and despatch to the various City offices upon which they are drawn. Any returns must reach the Clearing House before 5 p.m. on ordinary days or 1.30 p.m. on Saturdays, and must be received by the clearers and their amount credited to the returning bank on the same day by an adjustment on the Town clearing sheet. If Returns are received too late for inclusion in the clearing, they must be despatched at once to the crossing banks.

### **The Metropolitan Clearing.**

This takes place between the hours of 9 and 10.30 a.m. on ordinary days, and between 8.45 and 9.50 a.m. on Saturdays, and deals with cheques drawn on the Metropolitan branches of the clearing banks. The cheques are exchanged between the representatives of the various banks, and are thereafter dispatched to the relative branches upon which they are drawn for payment or return. Metropolitan cheques for any reason returned unpaid must be returned by post on the day of presentation direct to the bank or branch whose name appears in the crossing. The totals owing to or by each bank in respect of the Metropolitan clearing are included in the Town clearing totals of the following business day. (See below.)

### **The Country Clearing.**

The Country clearing takes place from 10.30 to 12.30 p.m. on ordinary days, and from 10 to 11.30 on Saturdays, cheques received by the respective head offices from their country branches and correspondents being exchanged by the representatives of the eleven clearing banks. The branches list all country cheques of each clearing bank on separate sheets, the totals of which are machined at the head offices on special lists in order to arrive at a grand total of the "Out" charge to be presented to each of the clearing banks. The "In" country clearing received by each bank from all the other banks is sorted and machined at

the relative head office, and the cheques of each branch are thereafter forwarded by post for payment or return. The totals of the country clearing are agreed between the "In" and "Out" clearers of each bank, and a grand balance is struck as between each bank and all the other banks, which is included in the Town clearing settlement of the next business day but one.

Country clearing cheques which are for any reason returned unpaid must be sent *direct* by the drawee branch to the branch of the presenting bank indicated in the crossing on the face of the cheque, and a voucher in the following form is forwarded on the same day to the head office of the drawee banker so that the amount may be allowed for in the settlement:—

NORTHERN BANK LIMITED

*Country Clearing Return*

Debit Southern Bank, Limited, for cheque returned  
direct to their branch at Watford by Sheffield branch.

£70, 12s. 6d.

1st September 19..

The branch to which the unpaid cheque is returned credits the amount to its head office or its clearing agent on the day of receipt, so that the head office may in due course credit the drawee banker in respect of the return.

Bills of exchange as distinct from cheques cannot be included in the Country Clearing, but should be presented direct through a branch or agent in the town of payment. Bills for collection should, whenever possible, be sent for collection a few days before maturity (see *post*, page 375) and should be crossed *on the back* with the stamp of the remitting branch.

### The Clearing Settlement.

The grand totals of the morning Town clearing are agreed between each bank before the clearing clerks leave the Clearing House. The afternoon clearing proceeds until the door of the Clearing House is closed at the appointed time as an indication that no further cheques can be presented. The total of the cheques presented in the second clearing is then ascertained and verified, and the balances which are owing to or by each bank are carried to a clearing summary sheet, which is ruled as shown on the following page.

On this sheet is entered the balance of the Country clearing for the previous day but one, together with the balance of the Metropolitan clearing for the previous day, allowance for returns having been made in both cases. When the two columns of this

sheet are totalled, the difference between the two totals gives the amount owing to or by each bank from or to the Clearing House as a whole, and this difference is settled by a transfer at the

## CLEARING SUMMARY SHEET

17th September, 19..

Debitors.

Creditors.

£	s.	D.		£	s.	D.
			Bank (Clearing outward only)			
			Barclay			
			Westminster, Lombard Street			
			Glyn			
			Midland, Princes Street			
			Westminster, H.O.			
			Lloyds			
			Midland, H.O.			
			Do., Branches			
			Bank of Liverpool & Martins			
			National			
			National Provincial, H.O.			
			Westminster, Bartholomew Lane			
			Counte			
			National Provincial, Princes Street			
			Williams			
			Country Clearing			
			Metropolitan Clearing			
			C.H. <sup>1</sup>			

<sup>1</sup> This item includes unadjusted errors known as Clearing House "differences".

Bank of England between the account of that bank and the Clearing House account. For purposes of this transfer a green or white ticket in the following form is used, the *green* ticket being used when a bank on balance has to receive from the Clearing House Account and the *white* ticket when the bank has to pay on balance :—

## GREEN TICKET.

## SETTLEMENT AT THE CLEARING HOUSE

London, 17th Sept., 19 ..

To the Cashiers of the BANK OF ENGLAND,

Be pleased to CREDIT our Account the sum of *two thousand and seventy pounds, 14/3d.* out of the money at the credit of the account of the Clearing Bankers.

£2070-14-3d.

per pro. Northern Bank, Ltd.,  
William Brown.

Seen by me,

P. Arnold, Inspector at the Clearing House.

## SETTLEMENT AT THE CLEARING HOUSE

BANK OF ENGLAND,

17th Sept., 19 ..

The account of Messrs *The Northern Bank, Ltd.*, has this evening been CREDITED with the sum of *two thousand and seventy pounds, 14/3d.* out of the money at the credit of the account of the Clearing Bankers.

For the Bank of England,

£2070-14-3d.

James Smith,  
Cashier.

## WHITE TICKET.

SETTLEMENT AT THE CLEARING  
HOUSE

London, 27th Sept., 19..

I the Cashiers of the BANK OF ENGLAND,

Be pleased to TRANSFER from our Account the sum of *three thousand, seven hundred pounds, 19/6d.*, and place it to the credit of the Account of the Clearing Bankers, and allow it to be drawn for by any of them (with the knowledge of either the Inspectors, signified by his countersigning Drafts).

*per pro. Northern Bank, Ltd.,  
William Brown.*

700-19-6d.

SETTLEMENT AT THE CLEARING  
HOUSE

BANK OF ENGLAND,

27th Sept., 19..

A TRANSFER for the sum of *three thousand, seven hundred pounds, 19/6d.*, has this evening been made at the Bank, from the Account of Messrs *The Northern Bank, Ltd.*, to the Account of the Clearing Bankers.

For the Bank of England,  
*James Smith,*  
Cashier.

£3700-19-6d.

This Certificate has been  
seen by me,  
*P. Arnold,* Inspector.

## Collection of Cheques, etc., on Banks outside the Clearings.

Cheques and bills on the many banks, discount houses, etc., which have offices in the City, but which are not members of the Clearing House, are described in practice as "Walks", by reason of the fact that they are collected individually by "Walks" clerks whose business it is to make a round of the City from the respective head offices. The items to be collected in this way are listed by the various branches and correspondents of the banks on special "Walks" Clearing forms, and settlement of the totals involved are made between the banks either by transfers in their accounts or by bankers' payments which are passed through the town clearing for payment.

Cheques, dividend warrants, interest warrants and bank post bills on the Bank of England are dealt with by other banks in much the same way as "Walks". The totals of such items received by the clearing banks from their branches and correspondents are recorded by the respective head offices in the *Bank of England Book* or *Goldsmiths' Book*, together with any other articles which it is proposed to pay in to the Bank, as, for example, surplus or defaced treasury and Bank notes, gold and silver coin, etc. The articles are thereafter presented direct to the Bank, and their total credited to the account of the presenting bank. The Bank of England itself presents cheques on other banks through the Clearing House in the ordinary way: in other words, the Bank clears "outwards" but not "inwards".

Cheques and bills drawn upon the London offices of Scotch and Irish banks are collected by individual presentation at the offices of the drawee banks much in the same way as "Walks" cheques, and settlement is effected either by banker's payment or by current account transfers.

Cheques and bills drawn upon the offices of Scotch and Irish banks in Scotland and Ireland are listed by the collecting branches of the English banks on special forms, and are thereafter forwarded to the respective head offices as part of the day's clearing. After machining the articles are presented with a verified total to the office of the Scotch or Irish bank which acts as a clearing agent in its own country on behalf of the English bank, and the proceeds are thereafter collected in the manner described in the following paragraphs.

In view of the greater trouble involved in clearing cheques drawn upon the Scotch and Irish banks, it is usual for English banks receiving such cheques for collection to charge a commission to their customers for the facility.

### **Cheques and Bills Drawn Upon Bank Offices in Scotland.**

Cheques and bills on banks and branches in Scotland which are received by the London office of a Scotch bank are sorted by it into three groups: (a) Articles payable at its chief offices in Edinburgh, Glasgow, Aberdeen or Dundee, or payable at the offices of other banks in these four cities. These are sent to the office of the bank in the city concerned for payment or collection. (b) Articles payable by the bank's own branches or by branches of other banks in towns where the collecting bank has a branch. These are sent by the agent to its various branches for payment or collection. (c) Articles payable in towns where the collecting bank has no branch. These are listed upon separate lists according to the bank upon which they are drawn, and are forwarded to Edinburgh to be passed through the Edinburgh Clearing House to the principal offices of the drawee banks. The Edinburgh Banker's Clearing exists for the exchange of cheques between the respective Scotch banks, and although the mode of settlement differs considerably from that in London, the essential method of clearing is the same.

In the absence of a central bank corresponding to the Bank of England at which all the clearing banks have an account, settlement is effected every month alternatively by the Bank of Scotland and the Royal Bank of Scotland. Every day the settling bank issues to or receives from each of the clearing banks a voucher indicating the balance owing to or by the clearing bank in respect of the day's clearing, but the actual settlement of the balances due between the banks is not effected until one of the bi-weekly settling days, Monday or Thursday, when the general balance is struck and a final settlement is effected by transfer in London.

### **Cheques and Bills Drawn Upon Bank Offices in Ireland.**

Cheques and bills payable in the Irish Free State or in Northern Ireland are dealt with by the London banks in much the same way



as they deal with articles payable in Scotland. The articles received by each clearing bank from its various branches and from its City office are machined at the head office and presented to the London office of the Irish Bank, which acts as clearing agent on behalf of the English bank. To these cheques, etc., are added any Irish cheques and bills received by the London office of the Irish bank, and thereafter the various articles are sorted into a number of groups according to the method of collection which is adopted. As there are in Ireland two distinct central clearings, one at Dublin for the Irish Free State and one at Belfast for Northern Ireland, at least six distinct groups are required, and these may be as follows: (a) Cheques and bills payable in and around Dublin; (b) Articles payable at towns in the Irish Free State where the collecting bank has an office; (c) Articles payable at towns in the Irish Free State where the collecting bank has no office; (d) Cheques and bills payable in and around Belfast; (e) Articles payable in towns in Northern Ireland where the collecting bank has an office; and (f) Articles in towns in Northern Ireland where the collecting bank is not represented. All articles payable in Dublin and Belfast are forwarded to the office of the clearing bank for collection through the Dublin or Belfast Town Clearings, while those payable at towns in the Irish Free State or Northern Ireland where the clearing bank has no branch are sent to its Dublin or Belfast office for collection through the Dublin or Belfast Country Clearing. The articles payable in provincial towns at which the clearing bank has a branch are usually sent direct to the respective branches for payment or collection.

### **The Dublin and Belfast Clearings.**

In both cities there are four clearings each day, (a) the morning clearing of notes and cheques, (b) the morning clearing of cheques on city branches other than the principal offices, (c) the midday clearing of cheques on the chief city offices and the country branches, and (d) the final afternoon clearing of cheques on the chief city offices only. The settlement of the balance of each day's exchanges is effected by transfers between the accounts of the clearing banks at the local office of the Bank of Ireland, but the grand settlement is effected twice weekly on Tuesdays and Fridays, when the net amount owing by or to the Bank of Ireland in respect of each clearing bank is settled by transfer between the Bank of Ireland and the London agent of each clearing bank.

### **The Collection of Articles received at Offices of the Scotch and Irish Banks.**

Cheques and bills on English banks received at the London offices of Scotch and Irish banks are presented by them for col-

lection and payment to the respective head offices of the English banks. Cheques received by the London offices of the Scotch and Irish banks on banks and branches in Scotland and Ireland are remitted by them for collection in the manner already described.

In the provincial towns of Scotland and Ireland local clearings exist between the various banks as is the case in England, but in addition, it is usual for the branches of each bank to exchange with other banks in the same town articles drawn upon the respective head offices or provincial branches, the branch thus receiving cheques being responsible for forwarding them for payment either to its head office or direct to the branches concerned. In Ireland, articles which cannot be cleared in this manner because no local branch of the relative bank exists, are forwarded for collection through the Dublin or Belfast office of the collecting branch, according to whether the cheques are payable at towns in the Irish Free State, or in Northern Ireland. In Scotland, such cheques are forwarded to the Edinburgh office for presentment through the clearing.

Cheques and bills payable at English banks and received by Scotch and Irish banks are remitted for collection through the London office of the receiving bank, by which they are presented in the usual way to the head office of the English bank concerned.

### **Scotch and Irish Cheques returned Unpaid.**

These are dealt with in almost the same manner as unpaid cheques on English banks, the articles being forwarded direct to the branch indicated in the crossing and settlement being effected either by means of a Returned Cheque Slip included in the clearing, or by special transfer in the books of the respective banks.

### **Collection of Cheques on Offices of the same Bank.**

Cheques upon the head office of a joint-stock bank which are received for collection by its agents or correspondents are usually listed separately by the receiving branch, settlement being effected directly between the head office and the branch by transfer in the head office accounts.

As a rule also a special *Branch Clearing* exists for the collection of cheques drawn upon its various branches and received by other branches of a joint-stock bank. Thus each branch separately lists all cheques drawn upon other branches of the same bank, the articles being forwarded in a separate envelope to the head office, where they are sorted and forwarded for payment to the branches upon which they are drawn. Settlement is effected by transfer between the relative branch accounts in the head office ledgers, cheques returned unpaid being forwarded direct to the crossing branch, and the amount thereof debited or credited in the accounts of the relative branches.

### Time Allowed for Collecting Cheques.

In practice, City banks endeavour to present all Town clearing cheques on the day of receipt, for it is the custom to assume that all cheques paid in by customers at the City offices of the clearing banks are paid unless they are returned unpaid on the same day. Accordingly, if one of the Town clearing banks is too late in presenting a cheque or cheques at the Clearing House, it is usual to present the cheque for marking at the bank upon which it is drawn (see page 335).

Cheques received by country banks are forwarded for collection on the day of receipt, and are assumed paid if they are not returned after the lapse of *three* clear days in the case of Country cheques, and after *two* days in the case of Town and Metropolitan cheques. Scotch and Irish cheques usually take four or five days for presentment and payment, and it is therefore not safe to assume that they are paid until the lapse of at least a week.

Any cheques which the drawee banker does not intend to pay should be returned *direct* to the crossing banker on the day of receipt, while any cheques which are received unpaid from other bankers should immediately be sent to the customer and his account debited with the amount.

### The Collection of Bills of Exchange.

As the crossed cheques sections of the Bills of Exchange Act, 1882, apply only to cheques proper, a banker obtains no protection if he undertakes the collection of bills of exchange as distinct from cheques on behalf of his customer, or, of course, if he collects such instruments on his own behalf. Apart from the fact that a bill of exchange (other than a cheque) cannot be crossed, it is not regarded as one of the essential functions of a banker to collect and present for payment bills of exchange other than cheques, so that a banker who undertakes to do so for his customer accepts the obligations and liabilities of an agent, and must exercise as much care and diligence in the collection and presentation as if the bill was being dealt with by the customer himself.

Accordingly, collection and presentment must be made strictly in accordance with the rules laid down by the Bills of Exchange Act, and dealt with in Chapter 16. Presentment must be made on the due date of the bill to the acceptor or person authorised to make payment on his behalf (e.g., the bank at which the bill is domiciled), at a reasonable hour and at the place where the bill is made payable, or, if no such place is specified, to the drawer wherever he can be found. A banker is not entitled to refrain from presentment merely because he knows or has been informed that the bill will not be paid by the acceptor, or because he knows that the bill was merely accepted to accommodate the drawer

or one of the indorsers. If presentment is to be made through another banker or agent of the collecting banker, the bill must be sent off in time to give such banker or agent reasonable time in which to make the necessary arrangements for the presentment, particularly if the place where the bill is payable or the place of residence of the drawer is distant or difficult of access. Furthermore, the collecting agent must, if necessary, be given time in which to determine whether any special expenses will be incurred by the presentment.

If the acceptor wishes to pay, payment should not be accepted in the absence of special instructions unless it is made in legal tender currency, or by draft of a reputable banker or by a marked cheque. As a rule, the bill may be given up in exchange for a marked cheque, but if an unmarked cheque is offered, the bill should not be surrendered to the acceptor, but should be attached to the cheque and a promise made to deliver it when the proceeds of the cheque are received from the drawee banker. Otherwise, if the bill is given up in exchange for a cheque, the banker as agent of the holder of the bill will be deemed to have waived his rights on the bill in favour of his rights on the cheque, and all parties prior to the holder will be discharged from further liability, the holder being left with his right of recourse only on the cheque itself.

If the banker is offered part payment of the bill, or a payment on account, he should accept the amount tendered and indorse the bill with a receipt acknowledging the amount received and clearly specifying that it is accepted as a part payment only without prejudice to the rights of all parties liable on the instrument. Such a receipt given by the banker in the ordinary course of his business does not require a receipt stamp (Finance Act, 1895, Section 9), and may be worded in the following terms:—

“Received of *James Brown*, the acceptor of this bill, the sum of *sixty pounds* in part payment and without prejudice to the rights of or against all other parties,  
 “For the Northern Bank, Limited,  
 “James Robinson,  
 “Manager.”

On no account should the bill be surrendered in such circumstances, but it should be noted for the unpaid balance, and notice of the dishonour of the bill in respect of the amount unpaid given to all parties liable thereon. A foreign bill will also require protesting for the balance unpaid.

If a bill is unpaid by the acceptor on presentation it should be at once noted by the bank, and if it is a foreign bill, it should be protested also. This, of course, makes it necessary for the banker to obtain the services of a solicitor or notary public, or in the absence of either, a householder (see Chapter 17). If a bill payable at the acceptor's place of business is not paid on presentment, a note should be left with the acceptor giving full

particulars of the bill and informing him that the bill lies at the bank awaiting payment. Then, if payment is not received by the close of business on the same day, the instrument should be noted or protested in the usual way. As a rule, bills domiciled at a bank are presented to that bank direct or through the local, Town or Metropolitan clearing, as the case may be, and are paid in the same way as cheques, but if presentment is made direct and is too late for settlement in the day's clearing, it is usual for the paying banker to give a marked cheque of the acceptor or his own draft in exchange.

If the bill has documents attached which are to be given up on payment, the collecting banker should hand over the documents only if he is paid in cash or by a banker's draft or marked cheque, unless, of course, he has any special instructions in this connection from the person on whose behalf the proceeds are being collected. In any case it is no business of his in the absence of special agreement to see that the documents are in order, although he must see that all documents received by him are duly transferred to the person entitled to have them.

### **" Short Bills ".**

The term " Short bills " is frequently applied in practice to bills of exchange received by a banker from his customers for collection on their behalf at maturity. In this connection, the term has no reference to the period for which the bills are drawn, but has its origin in the practice adopted by some bankers of entering the amounts of bills for collection paid in by the customer in an inner column on the credit side of the pass book, i.e., they are entered " Short " of the cash columns to indicate the fact that, although bills to the amount stated have been received by the banker from his customer, the proceeds have not actually been received and credited. The value of such bills is, of course, credited in the usual way when the proceeds are received by the banker at maturity.

" Short bills " are thus none other than Bills for collection, in contradistinction to " Bills payable ", i.e., those which the banker has to pay, " Bills discounted ", i.e., those which he has discounted for customers, and " Bills negotiated ", i.e., bills which he has purchased, either from his customers or from the money market. As short bills are held by the banker merely in his capacity as an agent for collection, the property therein and the proceeds belong to the customer and not to the banker. The former may thus claim the bills at any time if he wishes to do so, and is entitled to have the proceeds of the bills credited to his account, subject, however, to the banker's lien, by virtue of which the banker may retain bills left in his hands for collection and the proceeds thereof against any loan or overdraft owing to him by the customer (Section 27 (3) of the Bills of Exchange Act ;

see also Chapter 22). This right of lien does not give the banker any right to *dispose* of bills left with him for collection during their currency, but if he does so negotiate them, the transferee who takes the instrument in good faith obtains a good title enabling him to retain the bills and to enforce payment thereof against any party thereto.

The point is not of great practical importance in this country, but it may be noted that as the property in bills for collection is vested in the customer, such bills cannot be claimed absolutely by the trustee in the event of the bankruptcy of the banker. Nevertheless, the trustee can enforce any lien possessed by the banker in respect of the bills, and could therefore retain them until maturity, with power to apply the proceeds when received in discharge of the customer's obligations, transferring the balance (if any) to the customer.

### **The Liability of a Banker in Respect of Bills for Collection.**

As an agent for his customer, a banker must exercise due diligence in all matters connected with the presentation of bills of exchange which have been left in his hands for the purpose, and, in the event of his failure to act without negligence or to act in good faith, he would be liable to the customer for any loss which may ensue. Thus the banker would be liable for delay in making the presentment unless such delay is excused by the Act; or for omitting to present the bill at the proper place, or for neglecting to have it duly noted or protested in the event of non-payment. Apart from this, the banker will be liable also to the true owner for conversion or for money had and received if the bill bears a forged indorsement or if the customer has no title or a defective title. In such circumstances the banker will usually be able to fall back on his customer, but his liability to the true owner exists quite independently of any such recourse that he may have.

As a general rule, a banker does not indorse bills of exchange which are merely left in his hands for collection, and he cannot, therefore, be held liable as a party to the instruments. Frequently, however, the banker is himself the holder for value of the bills which he collects by reason of having discounted them for a customer or of having purchased them from the money market. In such circumstances the bills will usually be indorsed by the banker before they are negotiated or sent for collection, and he will accordingly be liable on his signature in just the same way as any other holder, in addition to having the usual rights against any prior parties. Furthermore, in the event of his transferee's title being defective, or in the event of there being a forged indorsement on the instrument, the banker will be liable in the usual way to the true owner for conversion or for money had and received.

### The Treatment of Unpaid Cheques and Bills.

Upon receipt of a cheque or bill which has been returned unpaid, the collecting banker should at once notify his customer, and will be liable for negligence if such notice of dishonour is not given within the time required by the Act (Chapter 16). As a rule, cheques and bills returned unpaid are forwarded to the customer from whom they were received, together with a covering letter giving the reason for the return of the cheque (whether that reason is written on the instrument or not) and informing the customer that his account has been debited with the amount, if such is the case. The banker is entitled as a matter of recognised practice to debit his customer's account with the amount of a returned cheque, even though the instrument may not have been indorsed by the customer or even though it may have been cashed for him, or have been applied in reduction of a loan or overdraft granted by the banker. In the case of a cheque which was cashed for a person who is not a customer, the instrument itself should not be returned to such person by the collecting banker, but notice of the dishonour should be sent together with a request for immediate payment of the amount. In no circumstances should the cheque itself be returned, otherwise the banker will be deprived of the only evidence of his right of action against any of the parties to the instrument, including the person for whom it was cashed if that person's indorsement was obtained.

Similar steps should be taken in the case of dishonour of a bill which has been discounted for a customer or other person, but the banker cannot hold any person liable if his indorsement has not been obtained to the instrument, except in cases where payment is refused because the instrument bears a forged or unauthorised signature, in which case the transferor will be liable under Section 43 (3) of the Act as having warranted to the banker that the bill was genuine.

Subject to the foregoing remarks, the general rule in practice is to return to the presenting customer all instruments which are dishonoured, unless the return is due to an obvious irregularity, as, for example, mutilation or error in indorsement which may be put right by the confirmation of the collecting banker. On the other hand, the customer must always be notified of the return of cheques or bills marked "R.D." or "N.S.", for apart from the necessity of giving notice of dishonour, it is to the customer's interests to be advised at once of the financial weakness of any persons with whom he is dealing. Sometimes, however, in the case of instruments returned with such an answer as "R.D., please re-present", or "Effects not cleared", the collecting banker takes it upon himself to re-present the instrument without returning it to the customer from whom it was received. But in all cases where this is done the customer

should be duly advised of the fact, otherwise, if the cheque is again returned, he may refuse to be debited on the ground that he was entitled to assume that the cheque was paid as he had not been duly advised of its first dishonour. For the same reasons the customer should always be advised when a cheque or bill returned unpaid is recalled for re-resentation by letter, telegram or telephone.

In accordance with Section 49 (6) of the Act (Chapter 16), the return of a dishonoured bill or cheque is in itself sufficient notice of dishonour, and the section accordingly recognises as legal the common practice of collecting bankers to return a dishonoured cheque or bill to the party liable, in lieu of giving him notice of dishonour. It may be noted, also, that in the matter of giving notice of dishonour, the head office and separate branches of a bank are entitled to the same time as if they were separate banks.

Full particulars of all cheques or bills returned unpaid for any reason are entered by the collecting banker in a special book kept for the purpose. This record is necessary in case queries arise concerning such cheques, and is also useful as enabling the collecting banker to keep before him the names of weak drawers of cheques paid in by his customers. Obviously, a banker would not usually permit a customer to draw against the proceeds of a cheque if cheques of the same drawer had previously been returned marked "R/D" or "N/S". It will be noted that a record is maintained of cheques returned *for any reason*. This is because bankers are known to return cheques of weak drawers on the slightest pretext of irregularity, with the object of giving such drawers time to obtain the necessary funds to meet the payments.



## CHAPTER 16

### THE RIGHTS, DUTIES AND POWERS OF THE HOLDER OF A BILL

THE great utility of a bill of exchange, after sight or after date, lies in the fact that it may be transferred or "negotiated" from one person to another any number of times before it ultimately falls due to be paid at maturity. As a rule, each transfer will be made for value, i.e., the bill will be given by one person and taken by another in payment for goods or services rendered. It is, therefore, essential that the rights and powers of those persons concerned in the passage of the bill from hand to hand should be clearly defined, and that the liabilities which they assume by transferring such an instrument should be laid down in unmistakable terms. These were the main objects sought to be achieved by the Bills of Exchange Act, 1882, which defines the rights, duties and powers of the holder, and the liabilities to such holder incurred by the various persons who become parties to the bill by attaching their signatures thereto.

In the present chapter we will consider the manner in which a bill is transferred or negotiated to or by a holder; the rights and powers of a holder in respect of the bill; his duties in regard to presentments for acceptance and payment, and the liabilities ordinarily incurred by the several parties to the instrument. The discussion of the dishonour of a bill in the hands of a holder, and of the discharge of a bill, ordinarily by payment at maturity to the holder by the party primarily liable, is postponed to the succeeding chapter.

### THE NEGOTIATION OF A BILL

In Chapter 11 it was explained that the important characteristics of a negotiable instrument are that the property therein may be transferred by simple delivery of the instrument itself so that the transferee, under proper conditions, obtains a title free from all equities and may sue on the instrument in his own name. The transfer of the majority of negotiable instruments is not governed by statute law, but as the bill of exchange is the most important and widely used of such instruments, the conditions governing its transfer are clearly defined in the Bills of Exchange Act, 1882. They are best considered under the three headings: (1) Issue; (2) Delivery; and (3) Transfer.

### The Issue of a Bill.

The mere fact that the drawer of a bill completes the instrument and appends his signature does not at once render the bill operative as a negotiable instrument, for the career of a bill or of any other negotiable instrument does not commence until it is properly issued. Section 2 of the Act defines *issue* as "The first delivery of a bill or note complete in form, to a person who takes it as a holder". As the Section requires the delivery of a "bill complete in form", there can be no legal issue of an *incomplete* instrument which is handed by the drawer to another person for the purposes of completion under Section 20 of the Act. Again, the deposit of a bill by the drawer in the hands of an agent, or in the custody of another person to await the instructions of the depositor, is not a valid issue of the bill, for such persons do not take as *holders*.

### Delivery of a Bill.

Sub-section 21 (1) of the Act, as already noted, requires the *delivery* of the instrument duly signed in order to complete the liability of the person signing. Thus, the drawer who has signed a bill does not ordinarily become liable in respect of his signature until he delivers the bill to the payee and thereby completes his liability. Section 2 of the Act defines *delivery* as "transfer of possession actual or constructive" from one person to another. Constructive delivery implies the transfer of the title to the instrument without a change in its actual possession, e.g., where the holder, originally holding on his own account, or in his own right, subsequently holds the bill as agent for another person, without any actual change of possession, or where a person, holding as agent, subsequently holds the instrument as holder in his own right.

The elements of a valid delivery are thus defined in Section 21 (2) :—

21. (2) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—

- (a) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be :
- (b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

But if the bill be in the hands of a *holder in due course* a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

"Immediate parties" to a bill are those who are in direct or immediate relation with each other, as, for example, the drawer and acceptor, or the drawer and payee, or the payee and second

indorser. Other parties are *remote*, as, for example, the acceptor and payee, or the drawer and third indorser.

The general rule of law is that oral evidence is inadmissible to vary the effect of a written contract, but by virtue of Sub-section 21 (2b), evidence may be admitted as between immediate parties, and as regards a remote party *other than* a holder in due course, to show that delivery of the bill was conditional only and was not intended to be effectual as a transfer of the property in the bill. In other words, the *drawer* may bring such evidence as a defence to a claim on the bill by the payee, or the acceptor as against the drawer, for in such cases the parties are "immediate". But the *acceptor* cannot bring evidence to dispute the payee's claim, or to dispute an indorser's claim, unless such remote parties (i.e., as regards the acceptor) are *not* holders in due course. Thus, if a promissory note is made by B payable to a banker C and is handed by B to C as collateral security for a current account, the banker C cannot sue B on the note if the account is in credit, for in such a case B and C are immediate parties and the delivery was conditional. Again, in *Lloyd v. Howard*, 1850, the transfer of a bill to another party for discounting on behalf of the transferor was held to be ineffective as a delivery of the bill except as against a holder in due course.

In the case of a holder in due course the valid delivery of a complete instrument is conclusively presumed, but it is to be noticed that such presumption does not apply to a change of possession while the instrument in question is incomplete or inchoate. The distinction may be evidenced by a comparison of the following cases. In *Ingham v. Primrose*, 1859, A drew a bearer cheque intending to deliver it to B, but before A issued the cheque to B it was stolen from his possession, and was subsequently negotiated to C, who took it as a holder in due course. C was able to sue A, since as against a holder in due course a valid delivery from A to B and between all parties prior to himself was conclusively presumed. On the other hand, in *Baxendale v. Bennett*, 1878, a blank acceptance was stolen from the possession of the drawer A, and was subsequently filled up as a bill. In this case even a holder in due course was held to have no title, since there was no delivery of a *complete* bill by A.

It is to be noted that delivery need not be made in person; it may be made by post or by any other agency. Thus, if a bill is indorsed by Robinson and sent by post to an indorsee Brown at the latter's request, the delivery will be valid and effectual. The post in such circumstances becomes Brown's agent, so that Robinson cannot recover the instrument once it is posted, and Brown must bear any loss which may arise if the bill is stolen during transit. This principle was exemplified in *Norman v. Ricketts*, 1886, where A sent a letter to X requesting the latter to pay a debt. X sent a cheque by post in settlement, but the cheque was stolen and cashed by the thief. By the form of his

request, A had made the Post Office his agent and was consequently compelled to bear the loss. The posting was held to be a valid delivery to the payee and the sending of the cheque therefore operated as payment. On the other hand, if there is no express or implied request on the part of the receiver that the post shall be used for delivering, the Post Office is the agent of the *sender*, and there is no delivery until the letter containing the bill has been handed by the Post Office to the addressee. Moreover, any loss must be borne by the sender.

The scope of the words "under the authority of" in Sub-section 21 (2a) is governed by the ordinary common law principles applicable to agency in general, but a relationship of principal and agent must exist. Thus, in the case of *Bromage v. Lloyd*, 1847, it was decided that an executor, not being an agent of the deceased, had no authority to complete the liability of the deceased on a bill which the deceased had signed before death, by delivering the bill to the named payee. On the other hand, in *Re Richards*, 1887, a promissory note was made by the maker in favour of his servant, and was handed to a solicitor with instructions that it should be delivered to the servant on the maker's death. This was done, and it was held that the delivery was valid as being made under authority.

As regards parties to a bill *other than* a holder in due course, it is provided by Sub-section 21 (3) of the Act that the presumption that a valid delivery has been effected by any prior party thereto may be rebutted by evidence :—

21. (3) Where a bill is no longer in the possession of a party who has signed it as a drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed *until the contrary is proved*.

### Transfer of a Bill.

The manner in which a bill of exchange may be transferred or negotiated is defined by Section 31 of the Act as follows :—

31. (1) A bill is negotiated when it is transferred from one person to another *in such a manner* as to constitute the transferee the holder of the bill.

(2) A bill payable to bearer is negotiated by delivery.

(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

Thus a bill is not properly negotiated if the *manner* of transfer clearly shows that the transferee is not to be constituted the holder, as where a bill is merely transferred to an agent for safe custody. Sub-section 2 indicates that a bill payable *to bearer* is in a deliverable state as it stands, whereas indorsement of a bill payable *to order* is essential to put it in a deliverable condition. As previously explained, indorsement means the affixing of the transferor's signature on the bill, either with or without directions requesting payment to be made to the transferee or his order or to the transferee only. The requisites and form of a valid indorsement are discussed in detail in Chapter 13.

### Effect of Transfer without Indorsement.

Although a bill drawn payable to order cannot be negotiated unless it is indorsed *before delivery*, such a bill is sometimes transferred by the holder without his affixing his signature. In such a case the effect of the transfer is thus defined by Sub-section 31 (4) :—

31. (4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

Thus, a bill payable to Robinson or order is delivered by Robinson to Brown without indorsement. Brown is not a *holder* within the meaning of the Act; he is merely an *equitable assignee* of a chose in action. He cannot sue in his own name, or negotiate the instrument to any person, but must join Robinson as a party to the proceedings with him in any action on the bill against any parties prior to Robinson. Brown may, however, bring an action against Robinson to *compel* him to give his indorsement to the bill, and when this is obtained, Brown then becomes a holder and can sue in his own name against any party.

Again, if X, the holder of a bill payable to his order, transfers it to Y without indorsement, and thereafter dies, the Court may compel X's executors or administrators to indorse the instrument in favour of Y. Similarly, if X becomes bankrupt, his trustee can be compelled to indorse the instrument in favour of the holder, Y. But negotiation of the bill in such circumstances will only date back to the time when the transferor or his representative actually indorsed the bill, so that if, in the first example, Brown had received notice of a defect in Robinson's title before Robinson had indorsed the instrument, then he (Brown) would be bound by such notice and could not sue as a holder in due course.

### Transmission of a Bill by Operation of Law.

The Bills of Exchange Act deals only with the transfer of a bill by negotiation, and does not touch the principles of general law by virtue of which the title to a bill may be *transmitted* from one person to another as a chose in action or chattel. Thus, on the death or bankruptcy of the holder of a bill, the title therein passes to his personal representatives in the former case and to the trustee in the latter event, and such personal representatives or the trustee in bankruptcy respectively may have to indorse the bill personally in order to obtain the funds for the estate. The indorser in such a case would be personally liable on the bill unless his indorsement in its terms restricted his personal liability, and intimated to all other parties that it was the signer's

intention to limit liability to the estate for which he acts. To meet such a case Section 31 (5) of the Act provides that :—

31. (5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

Examples of indorsements conforming with these provisions are given in Chapter 13.

Two other cases in which the title of a bill may be transmitted by operation of law arise : (i) when the bill is seized by a sheriff in execution under a writ, and (ii) where it passes to a trustee in bankruptcy by virtue of the doctrine of reputed ownership. In the former case, if a bill is amongst property seized by a sheriff on behalf of a judgment creditor, the sheriff can enforce payment of the instrument ; and a discharge given by him will be valid, though it appears that he cannot transfer it to another person. In regard to the second case, a trustee in bankruptcy may claim as part of a debtor's estate a bill or promissory note which is in the possession and *reputed* ownership of the debtor, although in fact it does not belong to him, provided that the bill is held by the debtor with the consent and permission of the true owner, and that it constitutes a debt due or growing due to the debtor in the course of his business. An example of the latter kind would be a current or matured bill in the hands of a bill broker who had become insolvent.

### Transfer of a Bill by Assignment.

As a bill of exchange is a chose in action, it may form the subject of a valid equitable or legal assignment, in the manner referred to in Chapter 11 *ante*. Thus, if the holder of a bill payable to his order transfers the instrument without indorsement to another person for value, the transfer will operate as an *equitable assignment*, and the transferee will obtain such a title to the bill as was possessed by the transferor. Again, the holder may execute a *legal* assignment of the bill in accordance with the provisions of the Law of Property Act, 1925, previously mentioned. In such a case the assignee will be enabled to sue in his own name, but his rights are subject to any prior equities attaching to the instrument, i.e., to any defence or set-off which prior parties may have against the assignor. Moreover, if the assignor does not give up the bill, and subsequent to the assignment transfers it to a holder in due course, the latter's *legal* title will prevail as against the assignee. Thus, in one case, X assigned to A certain property including a bill payable to bearer, but subsequently transferred the bill for value to B, who had no notice of the prior assignment. B, as a holder in due course, obtained the legal title to the bill, and his right thereto was unaffected by the claim of the assignee, A, under the assignment.

A bill or promissory note may also form the valid subject of a *donatio mortis causâ*, i.e., a gift made by a person in contemplation of and subject to his death. Thus, if Brown in contemplation of death hands a bill payable to bearer to Jones, the property in the bill passes to Jones on the death of Brown, *but not before*. Jones would have a valid title to such an instrument even if it had been payable to Brown's order, but had not been indorsed by him before death, in which case it would rest with Jones to prove his title to the instrument.

### Re-issue of a Bill.

Section 37 of the Act provides that :—

37. Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.

Thus, if a bill payable after date is indorsed by the holder to the drawer or acceptor, or a prior indorser, such drawer, acceptor or prior indorser may at any time before maturity re-issue the bill and indorse it away. For example, if A draws on B in favour of a payee C a bill which is negotiated to D, E, and F in turn, and F negotiates the bill by indorsement back to indorser C, C will retain his rights against A and B, but will have no right of action against D, E and F. This principle is known as the *rule against circuity of action*.

The words "Subject to the provisions of this Act" in Section 37 refer to the limitation of negotiation under Sub-section 36 (1) of the Act (*see below*). By virtue of this Sub-section if, in the previous illustration, E had indorsed the bill "*Pay F only*", then there could be no further negotiation back by F to C, since the form of E's indorsement prohibits further transfer of the instrument.

### Negotiation of Overdue Bills.

Generally speaking, a bill of exchange continues to be negotiable until it is paid at maturity by the principal debtor or party primarily liable, but Sub-section 36 (1) specifies two conditions under which the negotiation of a bill is stayed :—

36. (1) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed, or (b) discharged by payment or otherwise.

Reference should be made to Sections 59-64 and 68 as to discharge, and to Section 35 as to restrictive indorsements. An example of a restrictive indorsement is that given in the last paragraph but one, viz., "*Pay F only*".

In regard to the negotiation of an overdue bill, Sub-section 36 (2) of the Act provides :—

36. (2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

From this Sub-section it appears that the holder of an overdue bill cannot be a holder in due course ; indeed Sub-section 29 (1a) expressly states this, since his title is affected by any defect in the title of previous holders at or after the due date of the bill. The reason for this is that the fact that the bill is overdue should in itself arouse suspicion in the mind of a transferee. " He is a holder with notice for this reason : he takes a bill which on the face of it ought to have got home and to have been paid. He is therefore bound to make two inquiries : (1) Has what ought to have been done really been done, i.e., has the bill in fact been discharged ? (2) If not, why not ? Is there any equity attaching thereto, i.e., was the title of the person who held it at maturity defective ? " <sup>1</sup>

On the other hand, the mere fact that a bill is overdue does not of itself *cause* a defect in the title to the instrument, if it is otherwise perfectly valid. The Sub-section merely provides that if a defect *already exists* in the bill at maturity, then persons taking *after* that date are subject to any defects *which may exist*. Thus, if a bill is drawn payable to A's order in respect of an illegal consideration, and B takes it by indorsement from A *when overdue*, B cannot recover from the drawer. But where the drawer of a bill, which has been accepted for an illegal consideration, indorses it before the due date to A, who takes it *bona fide* for value without notice and indorses it when overdue to B, B can sue all the parties, since A had a good title.

It must be noted that the Sub-section expressly refers to a " defect of title ", a term which is defined in Sub-section 29 (2) of the Act. It follows that a person who takes an overdue bill for value is not affected by the fact that a prior party whom he seeks to hold liable has a right of set-off or other defence against the party from whom he received the bill, as the existence of a set-off or the fact that consideration was not given in respect of a prior transfer of the bill does not constitute defect of title. For example, if a holder X takes an overdue bill from a drawer Y for value, the fact that the acceptor A has a right of set-off against the drawer, or that the bill was accepted by A for the drawer's accommodation, does not prevent the holder X from succeeding in his action against A. In such circumstances, there is no question of defect of title ; in the first case, it is a matter of a right of set-off, and in the second a defence based on the absence of consideration.

As to when a bill payable otherwise than on demand is over-

<sup>1</sup> Chalmers, *Bills of Exchange*, 8th edn., page 138.



due, reference should be made to Section 14 (Chapter 11), from which it will be seen that such a bill is not overdue until after the expiration of the last day of grace. As to bills payable *on demand* (including cheques), Sub-section 36 (3) provides that:—

36. (3) A bill payable on demand is deemed to be overdue within the meaning and for the purpose of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

This provision is considered in reference to cheques in Chapter 12.

The date upon which a bill is indorsed does not as a rule appear on the instrument, and it is thus a matter of fact to be determined from the circumstances in each case. But by Sub-section 36 (4) of the Act it is provided that :

36. (4) Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue.

It is a matter for a jury to determine whether or not a bill was in fact negotiated before or after it was overdue.

### Negotiation of Dishonoured Bills.

Section 36 (5) of the Act runs as follows:—

36. (5) Where a bill which is not overdue has been dishonoured any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course.

Thus, it seems that with the sole exception that there can be no holder in due course of an *overdue* bill, the transferee of a dishonoured bill is in the same position as the transferee of an overdue bill.

## THE RIGHTS AND POWERS OF THE HOLDER

The terms holder, holder for value, and holder in due course have been explained briefly in Chapter 11, but it is now necessary to consider their respective rights in greater detail.

### Who is the Holder ?

As we have seen, the term "holder" usually means the person in possession of a bill who is lawfully entitled to it, and may enforce payment thereof against any party thereto. But it also includes a person who has unlawful possession of a bill, as, for example, the finder of a bill indorsed in blank or originally made payable to bearer, who, in spite of his defect of title, can nevertheless give a valid discharge to a person who pays in good

faith, and also confer a good title on a subsequent holder in due course.

But the term "holder" cannot be applied to a person who has no title at all, as, for example, a thief who has stolen a bill payable to the order of another person, or a person who has possession of a bill bearing a forged indorsement. Such persons are not holders in any sense of the term; in such cases, it is a question, not of *defective* title, but of no title at all, and, by virtue of Section 24 (see *ante*, page 235), the absence of title in such circumstances cannot be cured by any dealing with the bill.

The most important class of holder is a *holder in due course*, namely, that person whose title to a valid instrument is perfect and cannot be affected in any way by prior defects, and who holds the instrument free from all equities; and by virtue of Sub-section 30 (1), there is a presumption of law that *prima facie* every holder is a holder in due course. In reviewing the definition of such a holder as given by Sub-section 29 (1) of the Act, it should be observed that a number of important conditions must be fulfilled before a person can be constituted a holder in due course.

In the first place, such a person must be himself a holder, i.e., in the case of an order bill he must be the transferee of a bill properly indorsed and delivered to him. If A obtains a bill payable to his own order by fraud and transfers it to X without indorsement, then, although X takes the bill for value and with no notice of the fraud, he cannot be a holder in due course because he is not even a holder (see Section 2).

Secondly, the bill must be complete and regular on the face of it. A bill is considered complete even though it has not been accepted, but there can be no holder in due course of an *inchoate* instrument until it has been properly completed and delivered. Even that party who himself completes the instrument is not a holder in due course. A bill would not be regular on the face of it when taken by a holder if it bore evidence of having been torn in pieces with the obvious intention of cancelling it, and of having been pasted together again. Furthermore, a bill is not regular on the face of it if it bears evidence of erasure or alteration, and such erasure or alteration has not been properly initialled by the drawer.

Thirdly, the bill when taken must not be overdue, since the fact that a bill is overdue is in itself a warning that it may be invalid or affected with defects of title.

The fourth essential is that the bill has been taken for value. This means that the holder in due course *himself* must have given value; it is not sufficient that he takes through a person who holds for value.

Fifthly, the bill must have been taken in good faith, which implies that it must have been taken honestly, although in fact it may have been taken negligently. In illustration consider the

case where Brown takes a bill from Jones for value, and, although he suspects Jones has stolen the instrument, takes no steps to confirm his suspicions. If, as a fact, Jones has obtained the bill by false pretences, Brown cannot be a holder in due course as he has acted without good faith.

Lastly, the bill must have been taken without notice of any defect in the title of the transferor. The defects of title referred to are specified in Section 29 (2) of the Act, and must be distinguished from a complete absence of title, as in the case of a bill which bears a forged signature of the drawer, acceptor, or prior indorser. A person in possession of such an instrument is not a holder at all, and the instrument itself is of no effect in his hands. "Notice" within the meaning of this section means actual though not formal notice, that is to say, "either knowledge of the facts, or a suspicion of something wrong, combined with a wilful disregard of the means of knowledge" (Willes, J., in *Raphael v. Bank of England*, 1885). In this connection it must be remembered that notice to an agent is notice to his principal.

### The Rights of the Holder.

The principal rights and powers of a holder are thus stated in Section 38 of the Act:—

38. The rights and powers of the holder of a bill are as follows :

- (1) He may sue on the bill in his own name :
- (2) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill :
- (3) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill.

It will be observed that this section expressly or impliedly gives the holder a right (a) to sue on the bill in his own name ; (b) to hold or retain the bill, if he is a holder in due course, as against any prior parties ; (c) to negotiate the bill ; (d) to discharge the person paying the bill in due course. In addition, a holder has a right, in certain circumstances, which will be explained later, (e) if he so desires, to present a bill for acceptance and payment, where such presentment is excused ; (f) to note or protest a bill on dishonour by non-acceptance or non-payment and to recover the expenses incurred from prior parties ; (g) to insert additional matter on a bill, as, for example, the true date of issue if the bill is undated, or the true date of acceptance if the acceptance of a bill payable after *sight* is undated, or to convert an indorsement in blank into a special indorsement.

**THE HOLDER'S RIGHT TO SUE.**—In regard to Sub-section 38 (1), if a bill is payable to a person or persons, or to his or their order,

the action on the instrument must be brought in the name or names of such persons. Consequently, if a bill is payable to Brown & Co., it is not sufficient that an action be brought in the name of one of the partners or of the principal or managing partner. On the other hand, if the bill is payable to bearer, action may be brought in the name of any person who is in actual or constructive possession of the instrument, either alone or jointly with another or others. Thus, if Brown is the holder of a bill and indorses it in blank to a banker for collection, either Brown or the banker may take proceedings against the acceptor for the amount of the bill. In order that a holder may bring an action on the bill, it is immaterial whether he has had or has any material interest in the instrument, or that he has parted with such interest, so long as it cannot be shown that he holds the instrument adversely to the true owner.

In regard to Sub-section 38 (2), if the acceptor of a bill has a valid set-off or counter claim as against the payee, the latter cannot demand payment of the bill, but this fact would not prevent a subsequent holder in due course from enforcing full payment of the instrument as against the acceptor. In other words, a holder in due course as compared with a mere holder has the additional benefit that his title is not subject to equities and is entirely free from personal defences of prior parties. "The expression personal defences refers to such defences as set-off and counter claim, and probably also covers all such defences as omission of the duties of presentation, notice of dishonour, and protest or noting".<sup>1</sup>

The right to *sue* on a bill must be distinguished from the right to *recover* thereon, for, although any valid holder has a right to sue, i.e., take action at law, on the instrument, his right to recover or to succeed in his action will depend upon his title. If he is a holder in due course his prospects of success are much greater than if he is merely a holder for value.

### Title through a Holder in Due Course.

When a holder in due course appears as a party to a bill, no prior defect in title will pass through him so as to affect any subsequent holders, provided that they are not *parties* to any defect. For by virtue of Sub-section 29 (3) of the Act:—

29. (3) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

In illustration of this Sub-section, we may consider the case where A, the payee of a bill, obtains the acceptance of the drawee B to the instrument by fraud. A indorses the bill for value to C, a holder in due course, and C indorses it to D, who has notice

<sup>1</sup> Jacobs, *Bills of Exchange and Promissory Notes*, page 178.

of the fraud: D, whether he gave value to C or not, can sue B on his acceptance of the bill. But if D had taken any part in A's fraud in obtaining B's signature, then he could not sue B, even if he (D) had given value to C for the bill.

### THE DUTIES OF THE HOLDER

While the Bills of Exchange Act confers upon the holder of a bill certain well-defined rights, it also imposes upon him a number of important *duties*, the neglect or omission of which may have serious consequences both for the holder himself and other parties to the bill. These duties are chiefly (a) to present the bill for acceptance and payment in accordance with the rules laid down in the Act; (b) to note or protest the bill on dishonour, where such noting or protest is necessary; and (c) to give due notice of dishonour to all prior parties. Only the first of these will now be considered; the others are treated in the next chapter.

The importance of the holder's proper discharge of his duties in connection with a bill will be appreciated when it is pointed out that if a statutory duty is omitted or unduly delayed through his negligence or *laches*, the effect may be to discharge certain parties, not only in respect of their liability on the instrument itself, but also in respect of the debt or other consideration for which the instrument was given. Suppose, for example, that Retailer Jones buys goods from Wholesaler Brown and gives in payment a bill due in three months which he has drawn on Farmer Robinson, who is indebted to Jones. The bill is indorsed by Brown to a holder who carelessly omits to present it for acceptance and for payment on the due date. Brown and the drawer Jones will be discharged from any liability to the holder in the event of his not being able to obtain payment from Robinson, while Brown will also be freed as regards the consideration between himself and the negligent holder. And this will be so, even if Brown was not actually prejudiced by the holder's omission to give him notice of dishonour; as, for example, where the drawee Robinson may have been insolvent and all along quite unlikely to have honoured the bill by acceptance or payment.

Moreover, if the bill is in the hands of an *agent* of the holder, that agent must exercise as much care in discharging the duties of the holder as is required in the case of the holder himself, and if by reason of the agent's negligence any loss ensues, he will be liable to his principal in damages. Thus, the *duties* of a holder may fall on a person who is not liable as a party to the bill, but the remedy against such a person is for damages and not in respect of the bill itself. This point is of special importance to bankers, who so frequently have to undertake the duties of presenting bills of exchange for acceptance and payment on behalf of their customers.

## THE ACCEPTANCE OF BILLS

One of the first important duties of the holder of a bill is to present the bill to the drawee for his acceptance where this is necessary (see page 398). Although, as already stated, an instrument may be a valid bill before it is accepted, it is usual to obtain the acceptance of the named drawee as soon as possible, in order that the bill may be more easily negotiated by reason of being additionally secured by the signature of the drawee.

## Definition and Requisites of Acceptance.

Section 17 of the Act thus defines the form and requisites of a valid acceptance :—

17. (1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

[See Sections 2 and 21 as to the necessity for notification or delivery.]

(2) An acceptance is invalid unless it complies with the following conditions, namely :

(a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.

(b) It must not express that the drawee will perform his promise by any other means than the payment of money.

It is to be noted that only the drawee can accept a bill, either himself or by his duly authorised agent. Acceptance by a stranger or third party in the drawee's name will be either an unauthorised act or a forgery, while an acceptance by a stranger in his own name is of no effect (unless it is an acceptance for honour—see Chapter 17). Thus, if X signs an ordinary acceptance on a bill which is drawn on B, the acceptance is invalid, and neither X nor B is in any way bound. Similarly, if a bill is addressed to the *directors* of a company and is accepted by the directors and the *manager* of the company, the directors will be bound but not the manager.

But the signature to an acceptance need not strictly conform to the name of the drawee. The two should be considered together, and providing that the acceptance is in fact that of the drawee the acceptance will be valid. Thus, in *Dermatine v. Ashworth*, 1905, the word "Limited" was accidentally omitted in stamping the company's acceptance on a bill drawn on the company. It was held nevertheless that the signature was a valid acceptance by the company. Again, in *Lloyd v. Ashby*, 1831, a bill was drawn on a firm as "B. and Co." although its proper style was "A. B. & Co.", and the bill was accepted in that name. The acceptance was held to be valid.

Moreover, if a bill is addressed to two or more drawees, and is accepted only by one or some of them, those who sign the acceptance will be bound although the others will not. Thus if a bill is addressed to two persons, Brown and Jones, who are not

partners, and is accepted by Brown only, Brown will be liable in respect of his signature as acceptor although Jones will not be bound. On similar grounds, if a bill is addressed to a firm but is accepted by a partner in his own name, the partner signing will be personally liable, although the firm will not be bound. Conversely, if a bill is addressed to Robinson, a partner in a firm, and Robinson accepts in the firm's name, "Brown & Robinson", he is personally liable as acceptor and the firm is not bound by the signature.

As an acceptance must be written *on the bill*, the drawee will not be bound as a party to the bill if he signs a separate document expressing his willingness to accept the bill or to be liable as an acceptor thereof. Again, the fact that the drawee destroys a bill left with him for acceptance does not render him liable as an acceptor, although he may be sued in an action for conversion of the instrument.

Sub-section 17 (2 b) provides that an acceptance must promise payment in no other form than by the payment of money, so that an acceptance will be invalid if the acceptor undertakes to pay in any other way, as, for example, in exchequer bills, or in goods, or in silver bullion. In all such cases the holder is entitled to and should treat the instrument as dishonoured if he cannot obtain a clean acceptance.

### Time for Acceptance.

With reference to the time for acceptance, Section 18 of the Act provides that :—

18. A bill may be accepted—

(1) Before it has been signed by the drawer, or while otherwise incomplete : (See Section 20.)

(2) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment :

(3) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

By virtue of Sub-section 18 (1), an incomplete or inchoate bill may be accepted, but if the drawer has not signed or if the instrument is otherwise lacking in a legal essential, it will not be valid as a bill until the omission is rectified. The effect of the acceptance of a bill which is overdue is as if the acceptor had accepted a bill payable on demand, and he is, of course, immediately liable to pay the instrument.

In the absence of evidence to the contrary on the face of a bill, an acceptance is deemed to have been made before maturity and within a reasonable time after the issue of the instrument, but there is no presumption as to the exact date on which the acceptance was given.

Sub-section 18 (3) is intended to secure that the holder of a

bill which is dishonoured shall, as far as is possible, be placed in the same position as if there had been no dishonour. Thus, if a bill payable three months after sight is dishonoured by non-acceptance on the 1st June, but is subsequently accepted by the drawee on the 4th July, the holder may calculate the due date of the bill as from the 1st June, and can, therefore, present it for payment on the 4th September. In the absence of this provision in the Act, the bill could not be presented for payment until the 7th October, in which case the holder would be prejudiced by being out of his money for an additional thirty-three days, during which time the defaulting acceptor would have the benefit and use of the funds.

### General and Qualified Acceptances.

Although the order from the drawer to the drawee must be unconditional and unqualified in its terms, the Act provides that the acceptance of the drawee may be *general*, i.e., free from qualification of any kind, or *qualified* in certain definite respects. This option is granted to the drawee by virtue of Section 19 of the Act, which provides as follows:—

19. (1) An acceptance is either (a) general or (b) qualified.  
 (2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

In particular an acceptance is qualified which is—

- (a) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated:  
 (b) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn: (See Section 44 (2).)  
 (c) Local, that is to say, an acceptance to pay only at a particular specified place:

An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.

From these provisions it is clear that, although the drawer in making out his order must conform to a very rigid standard, the acceptor is not only given a fair degree of latitude in deciding how, where, and when he will pay the instrument, but is permitted by the terms of his acceptance to vary *the effect of the bill as drawn*, even to the extent of making the payment conditional.

It is, however, a question of law in each particular case as to whether the express terms employed by the drawee do in fact constitute a qualified acceptance. "Any words added to the acceptance must be clearly opposed to the tenor of the bill to constitute a qualification. . . . If an acceptor desires to qualify his acceptance he must do so in terms so clear and unequivocal that a holder could not fail to understand that the acceptance was subject to an express qualification".<sup>1</sup> Wherever possible, an acceptance is to be construed as general and not qualified,

<sup>1</sup> Jacobs, *Bills, Cheques, and Notes*, page 84.



and the insertion by the acceptor of a mere memorandum, e.g., a wrong due date, has been held to form no part of the acceptance such as would render it qualified.

Examples of qualified acceptances corresponding to the five classes mentioned in the Section would be as follows :—

- (a) **CONDITIONAL** : “ Accepted payable on surrender of bill of lading of wheat ”, or “ Accepted payable when in funds ”.
- (b) **PARTIAL** : A bill drawn for £100 is accepted thus : “ Accepted payable for £50 only, James Brown ”; or thus, “ Accepted payable £50 in cash and £50 in goods ”. The latter is valid as an acceptance for £50 only.
- (c) **LOCAL** : An acceptance will not be local unless it distinctly states that the bill will be paid at a place specified and nowhere else. Thus an acceptance in the form “ Accepted payable at the Northern Bank, Northtown ”, is general, whereas any of the following would be qualified as to place, i.e., local : “ Accepted payable at the Northern Bank, Northtown, and not elsewhere ”, or “ Accepted payable only at the Northern Bank, Northtown ”, or “ Accepted payable at the Northern Bank, Northtown, and there only ”.
- (d) **QUALIFIED AS TO TIME** : A bill is drawn payable three months after date, but is accepted as follows : “ Accepted payable six months after date, James Brown ”.
- (e) **SOME OF SEVERAL DRAWEES** : A bill is drawn on A, B, and C. A accepts, but B and C refuse to do so. This is a qualified acceptance by A. Nevertheless, if A has authority to accept for all the drawees, then the acceptance would not be qualified.

A holder is not bound to take a qualified acceptance but may regard it as a dishonour. (See below.)

### Presentment for Acceptance.

Presentment of a bill for acceptance may be effected by the drawer before the issue of the instrument, but the duty to present usually falls upon the payee or a subsequent holder. It must be noticed that, subject to certain statutory exceptions, it is not *compulsory* to present a bill for acceptance. The holder may, if he so desires, await maturity of the bill and then present it for payment. As a rule, however, the holder presents a bill for acceptance in order to secure the liability of the drawee by his signature on the instrument, for until the drawee signs he is not liable for due payment of the bill. If, however, the bill is accepted by the drawee, the holder in case of dishonour by non-payment has an immediate right of action on the bill against the acceptor. Moreover, the existence of the signature of the acceptor on a bill not only increases the guarantee or security for its due pay-

ment, but also makes the bill more readily received as a valid negotiable instrument by subsequent parties who take it for value. On the other hand, if the bill is not accepted by the drawee on presentment, the holder obtains an immediate right of recourse against the other parties to the bill.

In the case of bills payable on demand (including cheques) there is no need to present for acceptance, for payment of such bills can be demanded immediately. Nor is there any need to present for acceptance before presenting for payment a bill which is drawn "Pay without acceptance", a form which is said to be common in the French wine trade.

### When Presentment for Acceptance is Necessary.

The duties of a holder in regard to presenting a bill for acceptance are thus set forth in Section 39 of the Act, which, it will be noted, prescribes certain specific cases in which the holder *must* present a bill for acceptance:—

39. (1) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

(2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee it must be presented for acceptance before it can be presented for payment.

(3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

(4) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has no time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

The object of Sub-section 4 is to protect the holder of a domiciled bill which reaches him so late as not to give him time before maturity to present the bill for acceptance. In illustration, we may consider the case of a bill payable one month after date, drawn in New York on a Bristol firm, but made payable at a London bank. The bill reaches London on the date of maturity, but as the holder must present the bill at Bristol for acceptance before presenting it for payment, he is protected by the Sub-section against any delay which may arise by reason of his making presentment for acceptance, so that the delay will not prejudice his rights against any prior parties.

In the case of bills payable after sight, as the period of the instrument does not commence to run until it is presented for acceptance, unreasonable delay in making presentment might prejudice the position of an indorser or drawer, as, for example, where the holder has delayed for so long that when the instrument is presented the drawee has become financially incapable of meeting the claim. It would be clearly inequitable if, in such

circumstances, the holder could compel payment from the drawer or an indorser, so with the object of preventing such happenings, Section 40 of the Act enacts that :—

40. (1) Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

[See Section 41 (2) for the provisions.]

(2) If he do not do so, the drawer and all indorsers prior to that holder are discharged.

(3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

The remedy provided by this Section does not seem entirely satisfactory since there is nothing to prevent continual negotiation of a bill payable after sight from person to person without any presentment for acceptance, so long as no one holder retains the instrument for an unreasonable length of time. Moreover, the Section does not define the position of a person who, after retaining a bill for an unreasonable length of time, negotiates it without indorsement.

In deciding what is reasonable time for the purposes of this Section, consideration must be given to the interests of the different parties to the bill, i.e., the holder and the drawer and indorsers. The question is one partly of law and partly of fact. Thus, if Brown in Birmingham draws a bill at one month's sight on Hobbs of London, the holder will not be guilty of unreasonable delay if he holds it for four days before presenting it for acceptance, even though the bill is afterwards dishonoured. On the other hand, if Ford in New York draws a bill at sixty days' sight on Carr in London, and the holder retains the instrument for five or six months before negotiation, during which the exchange moves against the acceptor (i.e., the exchange between New York and London moves unfavourably to the latter centre), there will be unreasonable delay sufficient to discharge the drawer and indorsers if the acceptor refuses to pay.

### Rules as to Due Presentment for Acceptance.

The rules as to presentment for acceptance and the legal excuses for non-presentment are thus set forth in Section 41 :—

41. (1) A bill is duly presented for acceptance which is presented in accordance with the following rules :

- (a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue :
- (b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only :
- (c) Where the drawee is dead presentment may be made to his personal representative :

- (d) Where the drawee is bankrupt, presentment *may* be made to him or to his trustee :
- (e) Where authorised by agreement or usage, a presentment through the post office is sufficient.

The "holder" referred to in this Section need not be the true owner of the bill, but may be any person properly in possession of the instrument.

It will be noted that there is no provision in this Section (as there is in the case of presentment for payment) as to the place where the bill is to be presented for acceptance. It is usual for the drawer of the bill to specify the address of the drawee, but if the address is not given, presentment will be excused if the holder after exercising reasonable diligence cannot find the drawee. Where the drawee is a trader it is usual to present the bill at his place of business, and in such circumstances placing the bill in a bill box or giving the bill to a clerk in the office will constitute a sufficient presentation to the drawee. But if presentment is thus made to an agent of the drawee, the agent must be some person who may reasonably be assumed to have power to take and deal with a bill. For this reason it is not sufficient to hand in a bill to a servant or maid at a private house, while the fact that the drawer makes a bill payable at a bank will not excuse presentment to the drawee for acceptance, and permit presentment to be made at the bank named.

Presentment for acceptance must be made at a reasonable hour, i.e., during advertised banking hours in case of a bank, or during usual and recognised business hours in case of a trader. The term "business day" is explained by Section 92 as follows :—

92. Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.

"Non-business days" for the purposes of this Act mean—

- (a) Sunday, Good Friday, Christmas Day.
- (b) A bank holiday under the Bank Holidays Act, 1871, or Acts amending it.
- (c) A day appointed by Royal proclamation as a public fast or thanksgiving day.

Any other day is a business day.

The bank holidays in England, Scotland, and Ireland respectively are specified in Chapter 11. If the day on which a bill should be presented for acceptance is a bank holiday, presentment should be made on the succeeding business day. (*Bank Holidays Act, 1871, Section 2.*)

It is essential that presentment for acceptance be made before maturity, for although the acceptor will be bound by an acceptance of an overdue bill, the drawer and indorsers will be discharged unless the delay is excused in the circumstances provided for by Section 39 (4) *supra*.

In connection with Sub-section 41(1b) reference should be made to Sub-section 19 (2 e), from which it will be seen that, if one

of two or more drawees refuses to accept, the acceptance will be qualified and must be treated as such.

With reference to Sub-sections 41 (1 c) and 41 (1 d), it must be noted that they merely provide that presentment for acceptance *may* be made to the persons specified, i.e., presentment is optional in such cases. It is, in fact, excused under Section 41 (2 a) below, and the holder can treat the bill as dishonoured by non-acceptance. Sub-section 41 (1 e) recognises a common practice of merchants and banks to present bills for acceptance through the medium of the post.

### Excuses for Non-presentment for Acceptance.

The circumstances under which presentment for acceptance is excused are thus given in Sub-sections 41 (2) and 41 (3) of the Act :—

41. (2) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—

- (a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill :
  - (b) Where, after the exercise of reasonable diligence, such presentment cannot be effected :
  - (c) Where although the presentment has been irregular, acceptance has been refused on some other ground :
- (3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

From a consideration of Sub-section 41 (3), it would appear that in cases where the Act provides that presentment *must* be made, then unless presentment is excused under Sub-section 41 (2), there is an *absolute* duty on the holder to present, and his duty to do so is not excused merely by the fact that he has good reason to believe that presentment may be useless or futile.

### Mode of Presentment for Acceptance.

There are no statutory provisions defining the manner in which a bill shall be presented for acceptance. In the case of presentment for payment the Act provides that the mere exhibition of the bill to the acceptor is sufficient, but no such rule is applicable in the case of acceptance, for according to customary law it is essential that the bill be delivered over to the drawee for his acceptance, while he is allowed, in the case of ordinary trade bills, a period of twenty-four hours in which to accept or dishonour the instrument. But after the expiration of this period the drawee cannot further retain the bill and must re-deliver it to the person who delivered it to him for his acceptance, or render himself liable for the conversion or wrongful retention of the property of another. The customary period of twenty-four hours is exclusive of " non-business " days or hours.

In the absence of express arrangement between the parties,

or of an agreement to the effect implied from the course of dealings between them, the drawee, whether he accepts or dishonours the bill, is not obliged to send the instrument back to the holder. But he must redeliver it to the holder upon demand, and it is the duty of the holder to call for the bill after the expiration of the prescribed period. The wrongful detention or the wilful destruction of a bill by the drawee does not amount to acceptance of the instrument.

### Qualified Acceptances and the Holder.

There is no obligation on the part of the holder of a bill to take a qualified acceptance, but if he does take such an acceptance the drawer and indorsers will usually be discharged. It is, therefore, only just that the holder should be legally entitled to demand an unqualified acceptance, and that if the drawee refuses to give one the bill may be treated by the holder as dishonoured by non-acceptance. The rights of the holder in this respect are thus stated by Section 44 of the Act :—

44. (1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

(2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorised the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

(3) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto.

If the holder decides to take a qualified acceptance he should give the other parties to the bill notice of the qualification and not notice of dishonour (see below), and, by virtue of Sub-section 44 (3), any such party who does not object to the qualification within a reasonable time will be deemed to have assented thereto. It is to be noted, however, that in the case of a *partial* acceptance the drawer and indorsers will not be discharged even if they object to the qualification, provided the holder gives them proper notice of the qualified acceptance.

Sometimes the terms of a documentary bill or documentary credit may impliedly authorise the holder to take a qualified acceptance.

### THE PAYMENT OF BILLS

Upon the maturity of a bill which has been duly accepted by the drawee, it becomes the duty of the holder to present the bill to the acceptor for payment, and failure to do so will discharge the drawer and indorsers, for by virtue of Section 45 :—

45. Subject to the provisions of this Act a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.

The provisions referred to are those contained in Section 46, below.

By virtue of Section 45, if the bill was given to the holder in absolute payment of a debt or liability, the discharge of the drawer and indorsers by failure to present for the payment will also free them from any liability on the consideration given for the bill.

The liability of the acceptor remains unaffected by the holder's omission to present for payment unless there is an express stipulation contained in the terms of his acceptance that presentment for payment *must* be made on the day when the bill falls due. This is provided for by Section 52 of the Act :—

52. (1) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

(2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

Sub-section 52 (1) is based on the common law duty of the debtor to seek out his creditor and make payment to him. An example of an acceptance containing an express stipulation that the bill is to be presented for payment would be one running "Accepted Payable at the Northern Bank, Northtown, and there only". In such a case the holder must present it for payment at the place named in order to hold the acceptor liable.

### Rules as to due Presentment for Payment.

**TIME FOR PRESENTMENT.**—Sub-sections 45 (1) and (2) of the Act provide that :—

45. A bill is duly presented for payment which is presented in accordance with the following rules :—

(1) Where the bill is not payable on demand, presentment must be made on the day it falls due.

(2) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

The due date of a bill not payable on demand is calculated in accordance with the provisions of Section 14 (see Chapter 11). Sub-section 45 (2) is modified as regards the position of the drawer of a cheque by Section 74 of the Act, the effect of it is discussed in Chapter 12, *ante*.

**WHO MAY PRESENT.**—By Sub-section 45 (3) of the Act :—

45. (3) Presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place, as hereinafter defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

If presentment is not made by the holder or by some person authorised to receive payment on his behalf the presentment will be invalid. The acceptor's obligation is to pay the person who can give a *valid* discharge for the payment, so that if he pays a person who holds through a forgery, he may be called upon to pay again to the true owner. But it must be remembered that a holder whose title is *defective*, such as a finder or a thief who does *not* claim through a forgery, can give a valid discharge to an acceptor who pays in good faith. Moreover, the drawee of a *cheque*, i.e., the paying banker, is specially protected by Section 60 even in the case of a forgery, provided that he pays in good faith and in the ordinary course of his business.

### The Mode of Presentment for Payment.

As is pointed out above, Sub-section 45 (3) provides that presentment of a bill for payment must usually be made personally by the holder or by some person authorised to receive payment on his behalf, but by virtue of Sub-section 45 (8) of the Act :—

45. (8) Where authorised by agreement or usage a presentment through the post office is sufficient.

This section sanctions the custom of merchants and bankers of presenting bills for payment by post, but this would not, of course, be done unless the standing of the acceptor was beyond question, otherwise some difficulty might arise in obtaining the return of the instrument if it was dishonoured.

Where the place of payment or the drawee's address is distant from the residence of the holder, the usual practice, especially in the case of banks, is to forward the instrument for presentment to an agent or correspondent in the town of payment. If the post is used for this purpose, the holder will not incur liability if there is any delay which is not imputable to his fault, misconduct or negligence. [See below, Sub-section 46 (1).] Accordingly, if a bill is sent off by the holder to be presented for payment in time to reach the drawee on the day of maturity, the fact that delivery of the bill is delayed by mistake of the post office does not render the holder liable or discharge prior parties.

Where personal presentment is being made by the holder or his authorised agent, it is provided in Sub-section 52 (4) that :—

52. (4) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.



The holder is not compelled to deliver the bill into the hands of the acceptor until payment has been made. The provisions of the Act in this respect differ from those governing presentment for acceptance, for, as already noted, such presentment involves the handing over of the bill to the drawee, who is allowed a reasonable time in which to make up his mind whether he will accept or refuse acceptance.

The rule that the acceptor of a bill is entitled to possession of the instrument on payment is similar to that which operates in the case of a cheque drawn on a bank. The paid instrument operates as a voucher and discharge between the person paying and the drawer. If a bill domiciled at a bank is paid by the bank, it is usual in practice to forward the discharged instrument to the acceptor on the day following payment.

If the acceptor pays a person who pretends to be an agent of the holder but is not in fact authorised to receive payment, he will be called upon to make good to the holder any loss which may ensue. Conversely, if the acceptor employs an agent to pay on his behalf, the agent will be personally liable to the principal if he makes payment to the wrong person. It is for this reason that banks at which bills are domiciled require an indemnity from the acceptor before they will undertake to pay bills on his behalf, for they are not protected in respect of forged or unauthorised signatures on such instruments paid by them.

The question as to what is a reasonable hour on a business day has already been noted in connection with the identical provision relative to presentation for acceptance.

### The Proper Place of Presentment for Payment.

The "proper place" for the presentment of a bill for payment as referred to in Sub-section 45 (3) is thus defined in Sub-sections 45 (4) and (5) :—

45. (4) A bill is presented at the proper place :—
- (a) Where a place of payment is specified in the bill and the bill is there presented.
  - (b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.
  - (c) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.
  - (d) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.
- (5) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorised to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

The place of payment of a bill may be specified by the drawer when he draws the bill, or by the acceptor when he signs his acceptance, but if neither indicates the place of payment the

above rules must be strictly applied. It is to be noted that Sub-section 45 (4 *d*) applies only when all other places as specified in the previous Sub-sections are exhausted. Thus, if a bill is drawn which specifies no place of payment and no address of the drawee, Sub-section 45 (4 *d*) will apply only if the holder does not know the residence or place of business of the acceptor; but, if he does know either of these, then presentment must be made accordingly and presentment to the acceptor at any other place, as, for example, during a chance meeting in the street or elsewhere, will not constitute a valid presentment at the proper place in accordance with Section 45 (4 *e*).

It is the duty of the acceptor to be ready to pay the instrument when presented at the proper place, so that if the holder presents the bill at the proper place and the acceptor or his duly authorised agent is not there, then, by Section 45 (5), there is no need to make any further presentment, as the law will presume that a valid presentment has been made by the holder.

The operation of the Sub-sections 45 (4) and 45 (5) is illustrated by the following examples. A bill is accepted payable at the acceptor's bankers. Presentment for payment personally to the acceptor is invalid and insufficient, as the instrument in such circumstances can be validly presented only at the bank named. Again, a bill is addressed to "Mr Brown, 4 Marlborough Road, Bristol", and is accepted generally by the drawee Brown. The holder presents the bill at the address given and finds either (a) that the house is unoccupied or (b) that Brown is not now living there. In both cases the presentment for payment at the specified address is sufficient, and no further presentment need be made before the holder applies to the other parties for payment. Moreover, if the acceptor Brown dies before maturity of the bill, there will be a valid presentment if the holder presents the bill for payment at the address given, and there is no need for the holder to search for Brown's personal representatives in order to present to them. As in such a case the place of payment is specified, Sub-section 45 (7) (see below) does not apply.

If a bill is accepted payable at a bank, it will be a sufficient presentment for payment if the instrument is presented to a clerk or official of the bank at or through the clearing house in the ordinary manner of bankers. Moreover, if alternative places of payment are specified, as for example, the residence of the drawee and also the address of his bankers, presentment for payment at either of such places is sufficient and valid.

### **To Whom Presentment for Payment must be Made.**

By virtue of Sub-section 45 (3), quoted above, presentment must be made either to the person designated as the payee or to some person authorised to pay or refuse payment on his

behalf. The Act further provides by Sub-sections 45 (6) and (7) that :—

45. (6) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

(7) Where the drawee or acceptor of the bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be and with the exercise of reasonable diligence he can be found.

If a bill is accepted payable at a bank, presumably the bank is the person authorised to pay or refuse payment on behalf of the acceptor, so that, in the case of such an acceptance, Sub-sections 45 (4 a) and 45 (3) both operate to make presentment at the bank imperative.

From the face of the instrument it may be doubtful whether two acceptors to a bill are partners or not, but the presumption is that two persons separately designated are not partners unless there is an indication to the effect on the instrument, and in such a case presentment must be made to them both. But it will nevertheless be sufficient if payment is made, or if a refusal of payment is made, by one of such persons on behalf of both, or, if there are several acceptors, by one of them on behalf of all. If the acceptors are partners it is sufficient if presentment is made to one of them, for it is a legal presumption that one partner has authority to pay or refuse payment on behalf of himself and his co-partners.

In connection with Sub-section 45 (7) it should be carefully noted that presentment must be made to the personal representatives only if no place of payment is specified in the bill, but if such a place of payment is given then presentment for payment must be made at that place in accordance with Sub-section 45 (4 a).

### Delay in Presentment for Payment.

Sometimes it happens that, without any fault or negligence on the part of the holder of a bill, he is unable to present the instrument for payment on the prescribed day, and in such circumstances although *presentment* is not excused, the *delay* in making presentment is excused if the holder can bring himself within the provisions of Sub-section 46 (1), which reads as follows :—

46. (1) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

It must be noted that this Sub-section does not *entirely* excuse presentment for payment, and that presentment must be made with due diligence after the disability is removed. A case illustrating this rule was that of *Patience v. Townley*, 1805, where

a bill was drawn in England and made payable in Leghorn. At the date of maturity of the bill, Leghorn was being besieged by enemy forces, and as the holder was not in Leghorn at the time, it was held that delay in making presentment for payment was excused. If the siege had been raised within a reasonable time, presentment would have had to be made by the holder, but otherwise presentment would be entirely excused by Sub-section 46 (2) below.

The Bills of Exchange Act, 1914, specially provided for cases in which delay in presentment of a bill payable outside the British Isles was occasioned by circumstances arising out of the Great War, or by similar circumstances which made it impracticable to transmit the bill to the place of payment with reasonable safety.

The more usual circumstances in which delay in making presentment is excused arise where delay is caused by fault and mistake on the part of the Post Office, provided the bill is dispatched to the acceptor in time to reach him on the date of maturity. (See above, under "Mode of Presentment".)

### When Presentment for Payment is Excused.

The rules governing the circumstances in which presentment for payment is entirely excused are set forth in Sub-section 46 (2) of the Act as follows :—

46. (2) Presentment for payment is dispensed with,—
- (a) Where, after the exercise of reasonable diligence presentment, as required by this Act, cannot be effected.  
The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.
  - (b) Where the drawee is a fictitious person.
  - (c) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.
  - (d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.
  - (e) By waiver of presentment, express or implied.

It is to be noted that the Sub-section prescribes different rules according to the different parties concerned. Thus, whereas clause (c) applies as regards the *drawer* and clause (d) as regards any *indorser*, clauses (a), (b) and (e) apply as regards *all* prior parties to the bill.

An example of circumstances in which presentment was entirely excused because it could not be made after the exercise of reasonable diligence arose in the case of *Hardy v. Woodroffe*, 1818, where a bill was drawn payable at Guildford and the drawee did not reside there. The bill was presented at two banks in the town, and was thereafter treated as dishonoured. It was held that the presentment was sufficient. Circumstances' in

which the holder has reason to believe that a bill will be dishonoured on presentment but which do not excuse such presentment arise, for example, where the acceptor has become bankrupt, or has disappeared from the country, or has been sentenced to a long term of imprisonment for fraud, or has entered a poor law institution, or where the acceptor informs the holder that he will not or cannot pay the instrument when it falls due.

Presentment for payment would be excused on the grounds that the drawee was a fictitious person if the bill was drawn on "Robinson Crusoe, Esq." or "Old King Cole", or "Father Neptune", or some such name which is obviously inserted by way of pretence merely. In such a case the bill may be treated as a promissory note at the option of the holder, and if it is so treated there is, of course, no need to prove presentment for payment or dishonour before application is made to the drawer for payment. (See *post*, Chapter 18.)

It must be specifically noted that Sub-section 46 (2 c) applies to cases in which the *drawer*, and not the holder, has reason to believe that the bill will not be paid if presented. Thus, if a bill is accepted to accommodate the drawer, and the drawer indorses the bill to a holder, then, unless the drawer has supplied the acceptor with funds to meet the bill, there is no need for the holder to present the bill for payment before he sues the drawer. But the holder would be very unwise to refrain from presenting for payment merely because he knows that the bill was accepted for the drawer's accommodation, while if the bill bears more than one indorsement, presentment must be made by the person holding the bill at its maturity if he wishes to retain his rights against any prior indorsers, for the Sub-section excuses presentment in the circumstances mentioned only so far as the drawer is concerned and no one else. This Sub-section also excuses presentment of a cheque for payment so far as the drawer is concerned, if he has no available funds at the bank to meet the cheque if presented. In any of such circumstances the holder can commence an action against the drawer for recovery of the amount without proving presentment for payment and without giving the drawer notice of dishonour.

Clause (d) similarly provides for the case where an indorser has no reason to expect that a bill accepted for his accommodation will be paid if presented, and in such circumstances the holder has no need to prove presentment for payment or dishonour before proceeding to sue the indorser for the amount of the instrument.

In regard to Clause (e), implied waiver would arise if the acceptor or indorser with notice that the holder had omitted to present the bill for payment on the due date nevertheless promises to pay the instrument, or, if after presentment has not been properly made, the acceptor hands the holder a sum of money in part payment of the bill. Again, in *Hopley v. Dufresne*, 1746,

it was held that there had been an implied waiver of presentment when a prior party had asked the holder for an extension of time in which to make payment. Express waiver would arise, for instance, where an indorser, in accordance with Section 16 (2), adds after his signature "Presentment for payment waived".

### **Presentment for Payment when a Bill is Lost.**

The fact that a bill is lost does not excuse presentment for payment, but in such circumstances the holder should present a copy of the instrument and tender the acceptor an indemnity against the claims of any persons who may come into possession of the lost instrument. Moreover, the fact that a bill has been lost does not excuse the giving of notice of dishonour, and if the acceptor refuses to pay and notice is not given to the drawer and indorsers, such parties will be discharged from liability on the instrument.

### **Presentment for Payment by Agents.**

The rules regarding presentment for payment are of particular importance so far as bankers are concerned for they are frequently called upon to present bills of exchange for payment on behalf of their customers. Any such person acting as collecting agent for his principal will be liable in damages to that principal if he fails to use due diligence in making the presentment and to take the necessary legal steps in the event of dishonour. Moreover, a banker who undertakes such duties will be liable for default or negligence of any agent or correspondent whom he employs for the purpose of making the presentment of bills placed in his hands by customers. It is for this reason that bankers sometimes endeavour to safeguard themselves by taking from their customers a special form of indemnity protecting them against loss in the event of any default on the part of their agents or correspondents.

It should be noted that these principles regarding the necessity for making due presentment apply equally in circumstances where a banker or other person holds a bill as a bailee or pledgee, or where a banker holds a bill as collateral security in respect of any advance or overdraft granted by him to the customer owning the bill.

### **Presentment for Acceptance and Payment Compared.**

Sir Mackenzie Chalmers<sup>1</sup> draws the following comparison between presentment for acceptance and presentment for payment: "Comparing presentment for acceptance with presentment for payment it is clear that the two cases are governed by somewhat different considerations. Speaking generally, pre-

<sup>1</sup> *Bills of Exchange*, 8th Edn., page 168.

sentment for acceptance should be personal, while presentment for payment should be local. A bill should be presented for payment where the money is. Anyone can then hand over the money. A bill should be presented for acceptance to the drawee himself, for he has to write the acceptance; but the place where it is presented to him is comparatively immaterial, for all he has to do is to take the bill. Again (except in the case of demand drafts), the day for payment is a fixed day; but the drawee cannot tell on what day it may suit the holder to present the bill for acceptance. These considerations are material as bearing on the question whether the holder has used reasonable diligence to effect presentment”.

### THE LIABILITIES OF PARTIES TO A BILL

The relationship of the various parties to a bill have been previously indicated. It is now necessary to consider the precise nature of their liability to the holder and as among themselves, and also the guarantee impliedly given to the holder by each party in signing the instrument. The mode of ascertaining the amount of damages for which each party so signing is liable is explained in the succeeding chapter.

It may be reiterated that a person does not become a party to a bill unless his signature appears thereon, so that the drawee is not liable until he accepts and the payee is not liable until he indorses. The first person to undertake liability on a bill is usually the drawer, although a bill may be accepted before the signature of the drawer is affixed. If the bill is presented for acceptance and is accepted before issue to the payee, the acceptor will be the second party to become liable, although by signing he assumes liability as the party primarily responsible to all subsequent holders. Following him, the payee when he indorses will assume liability and subsequent holders in order will become liable in order as they respectively indorse.

### Presumption as to Value and Good Faith

There is a presumption of law that every party to a bill has become a party thereto for valuable consideration, and that *prima facie* every holder is a holder in due course. This is provided for by Section 30 of the Act :—

30. (1) Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

(2) Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, force and fear or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

For example, X accepts a bill drawn by A for the latter's accommodation, and the instrument is indorsed for value to B and C. C sues the acceptor X, but it is no defence on X's part to show that the bill was accepted merely for the drawer's accommodation; and C need not prove that he himself gave value, for he is not concerned with the absence of value as between the drawer and the acceptor, A and X. Even if C had given *no* value for the bill, he is entitled to recover against X if B gave value, but if in such circumstances C sued B, B could prove the absence of consideration as between himself and C, and C would be unable to recover payment. Moreover, if the drawer A paid C, and then sued the acceptor X on the bill, it would be open to X to prove that he accepted the bill merely for the drawer's benefit and accommodation, and on doing so he would be freed from his liability to pay A.

In other words, when the holder of a bill sues any party thereto, it is not necessary for the success of his claim to prove that he gave value to the defendant. It is sufficient that value should have been given by *any prior party* to the instrument provided the defendant became a party to the bill *before* value was given for it. Thus a plaintiff can succeed although he gave nothing for the bill, and although the defendant received nothing for becoming a party to the instrument, and whether or not the plaintiff knew that the defendant had received nothing in respect of the instrument.

### The Liability and Warranties of the Drawer.

The statutory warranties undertaken by a person who draws a bill and attaches his signature thereto are laid down in Section 55 of the Act :—

55. (1) The drawer of a bill by drawing it—

- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken.
- (b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

“Due presentment” means presentment for acceptance and payment in accordance with the rules which have been discussed earlier in this chapter. A bill is accepted “according to its tenor” when it is accepted generally (i.e., as drawn), and if it is not so accepted (i.e., if a qualified acceptance is given) the holder is entitled to treat the bill as if it had not been accepted at all. As the drawer only undertakes that the bill shall be accepted and paid according to its tenor, it is only reasonable that he should be discharged if a qualified acceptance is taken without his consent, and this is provided for by Section 44. Thus, while the drawer undertakes that the bill shall be paid as it is drawn



if the acceptance taken by the holder is *general*, he nevertheless agrees that it shall be paid according to its tenor as qualified by the acceptance if a qualified acceptance is taken by the holder with his (the drawer's) consent.

It is to be noted that this general undertaking of the drawer may be limited in accordance with the provisions of Section 16 (1) of the Act, which provides that the drawer of a bill, and any indorser, may insert therein an express stipulation negating or limiting his own liability to the holder. Thus the drawer may qualify his signature by adding the words "Sans recours" or "Without recourse to me", in which case he does not undertake to pay the holder in the event of dishonour.

Sub-section 55 (1 b) operates to prevent the drawer from denying the payee's *existence and his capacity to indorse* at the time the bill is drawn, but does not impose upon him any responsibility for the genuineness of the signature of the payee, so that he is in no way responsible to the holder if the signature which purports to be that of the payee is forged or unauthorised.

### The Liability and Warranties of the Acceptor.

Unless he signs the bill as acceptor the drawee is not liable on the bill in any capacity. Consequently neither at common law nor under the *Bills of Exchange Act, 1882*, does the drawee as such give any warranties to the existing parties. The drawee remains liable to the drawer solely in respect of the consideration for which the bill was drawn, but the action which may be taken in this connection is a common law action and is in no sense an action on the bill itself. It must be remembered also that, although a bill is a written instrument signed by certain parties, it does not (in England or Ireland) operate as an assignment of funds in the hands of the drawee, so that the drawee cannot be sued by a holder as the assignee of funds due by him (the drawee) to the drawer. This is provided for in Section 53 of the Act:—

53. (1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This sub-section shall not extend to Scotland.

(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee.

The operation of this section can be illustrated as follows: Suppose X owes B £100 and B draws a bill on X for the amount, transferring the instrument to C in payment of a debt. The fact that X refuses to accept the bill does not enable C to sue him on the bill, nor to sue him in the capacity of assignee of the debt owed to B by X. But if X had issued a confirmed letter of credit in favour of C, C would have a right of action against X, on the dishonour of a bill drawn under that credit. The operation

of the Section so far as it refers to cheques drawn by customers on bankers is explained in Chapter 12.

When, however, the drawee of a bill accepts the instrument he thereby becomes a party to the bill, and is thereafter the party primarily liable on the instrument to all persons taking it for value. The statutory warranties and liabilities of the acceptor are thus set forth in Section 54 of the Act :—

54. The acceptor of a bill, by accepting it—

- (1) Engages that he will pay it according to the tenor of his acceptance :
- (2) Is precluded from denying to a holder in due course :
  - (a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill ;
  - (b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement ;
  - (c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

From the terms of Sub-section 54 (1) it is to be observed that the acceptor is liable only to the extent of the tenor of his acceptance. He is under no obligation to see that the bill is such that it cannot be subsequently altered fraudulently, so that an acceptor is not liable on a bill which has been altered in amount after his acceptance, except in respect of the original amount of the instrument as it was accepted by him. The operation of this sub-section is illustrated in the case of *Scholfield v. Earl of Londesborough*, 1896, explained on page 237. It should be observed that the liability of the acceptor of a bill on alteration of the amount differs from the liability of the drawer of a cheque, for the latter may be held liable for the fraudulently increased amount of a cheque if by his negligence he facilitates the alteration. See *London Joint-Stock Bank v. Macmillan* on page 268, *ante*.

Sub-section 2 operates by way of estoppel against the acceptor, but it is to be noticed that, whereas he warrants the existence of the drawer and the genuineness of his signature to the bill, he does not warrant his indorsement, where the bill is payable to the drawer's order, nor does he warrant the genuineness of the indorsement of the payee, where the bill is drawn payable to or to the order of a third party.

The effect of the Section may be illustrated by considering the case of a bill which is drawn by Brown on a drawee Robinson, and payable to Jones. The bill is passed to the payee Jones before acceptance and he indorses the instrument to Andrews, who takes it as a holder in due course and obtains Robinson's acceptance thereon. After acceptance, Robinson cannot thereafter question the existence of the drawer Brown, or his capacity or right to draw the bill, or the genuineness of his signature, neither can he question the existence of the payee Jones, nor his capacity to indorse the bill to Andrews, the holder in due course. On the other hand, the acceptor Robinson does not take any

responsibility for the genuineness or validity of the indorsements of either Jones or Andrews, in spite of the fact that Jones' indorsement may have been on the instrument at the time of Robinson's acceptance.

### The Liability and Warranties of an Indorser.

The warranties given by an indorser and the liabilities assumed by him are given in Section 55 (2) of the Act :—

55. (2) The indorser of a bill by indorsing it—

- (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken ;
- (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements ;
- (c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

It is to be noted that the provisions of Sub-section 55 (2 a) are similar to the corresponding provisions applicable to the drawer under Sub-section 55 (1 a), *ante*, but whereas the drawer undertakes to indemnify any indorser whatsoever, the indorser undertakes only to indemnify any indorser subsequent to himself who may have been called upon to pay the bill.

The words "according to its tenor" in Sub-section 55 (2 a) must apparently be taken to mean the tenor of the bill at the time the bill was indorsed, and cannot be assumed to relate back to the time of acceptance or drawing of the bill. Thus, an indorser would be liable to a subsequent indorser for the increased amount of a bill if the amount had been altered after drawing or acceptance but before the time of his indorsement. Moreover, if a person indorses a bill which bears a prior forgery, he will be unable to bring forward the forgery as a defence to an action by a holder or indorser subsequent to himself.

Reference must be made here to those indorsers who are termed *quasi-indorsers*, by virtue of the operation of Section 56, the terms of which have already been noted on page 285, *ante*. From that Section it is to be noticed that, so far as liability is concerned, the law draws no distinction between a *quasi-indorser* and an indorser in the strict use of the term, and the warranties of the former are such as are defined in Sub-section 55 (2) above.

### Order and Ratio of Liability of Parties.

In considering the parties on the bill collectively and not individually it becomes necessary to determine the order, if any, of their liability on the instrument, and also the ratio of liability

as between themselves and so far as outside parties are concerned. Byles thus describes the position: "The legal effect of drawing a bill payable to a third person, is a conditional contract by the drawer to pay the payee, his order, or the bearer, as the case may be, if the acceptor do not. The effect of accepting a bill or making a note is an absolute contract on the part of the acceptor of the one or maker of the other, to pay the payee, his order or the bearer, as the instrument may require. The effect of indorsing is a conditional contract on the part of the indorser, to pay the immediate or any succeeding indorser, or bearer, in case of the acceptor's or maker's default".

There are two periods of time to be considered when ascertaining the order of liability on a bill, viz: (a) before acceptance, and (b) after acceptance.

*Order of Liability of Parties before Acceptance.*—Before acceptance of a bill the *drawer* is ultimately liable, i.e., he is the principal debtor, and the indorsers, if any, are sureties for due payment by him to any holder. Thus, A draws a bill on B and delivers it to C who indorses it to D, who indorses it for value to E. If B has not accepted, A is the party who is ultimately liable, i.e., he is the principal debtor and E, the holder, can sue A immediately on dishonour without suing C or D, who are merely in the position of sureties for A. Or E can sue D only, or he can sue A, C and D together, but whichever party is sued has a right of action against a previous party until the liability eventually rests on A, who has no action on the bill against B, but can sue B for the consideration in respect of which the bill was drawn.

*Order of Liability of Parties after Acceptance.*—In this case the *acceptor* is the party ultimately liable, i.e., he is the principal debtor, and the drawer and indorsers are sureties severally liable if he fails to pay. Thus, if B in the above example accepts the bill, then he (B) is the person who is ultimately liable, i.e., liability will ultimately fall on him after passing through perhaps, D, C and A respectively if B dishonours; or he may be sued directly by E. In the event of dishonour, E can sue any prior party on the bill for the whole of the amount, or he may sue A, C and D together.

It must be noted, however, that the sureties on a bill are not in the position of ordinary sureties who can claim division of the liability; *each* party is *individually* liable for and may be sued for the whole amount of the instrument, and he cannot claim that he is liable only for a proportionate amount according to the number of parties to the bill. Moreover, the right of any party (other than the acceptor) who is compelled to pay is to sue any prior party for the full amount of the bill, and the party so sued must in turn proceed against any parties prior to him.

The order of liability amongst the sureties is that in which the indorsements are affixed to the instrument, i.e., the order of

liability is from a subsequent party to a prior or previous party. Thus, in the example given, the holder E can sue any or all of the *prior* parties A, B, C or D, but if C had to pay the bill, then he could not sue either D or E as these are parties subsequent to him, although he could sue either A or B. Difficulty sometimes arises, however, because the indorsements do not appear in the order in which the bill was actually negotiated, and in such circumstances oral evidence has to be admitted to prove the order in which the indorsers are properly liable. (See Chapter 15.)

It must be remembered that the right of any party to avail himself of any previous right of action depends upon whether proper notice of dishonour has been given to the party or parties whom it is sought to hold liable.

The amount of damages which a person (i.e., the holder or any indorser who has been compelled to pay the bill) may recover from a prior party or the drawer or acceptor, as the case may be, is provided for in Section 57 of the Act, as is explained in the following chapter.

### The Liability of a Transferor by Delivery.

It has already been noted that only those persons who have signified their assent to incur liability on a bill by affixing their signature to the instrument are properly described as *parties* thereto. Certain obligations are, however, assumed by a person who, being in possession of a bearer bill (i.e., one which originally or by indorsement is payable to bearer), negotiates it without indorsing it. In such cases Section 58 of the Act provides that :—

58. (1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery."

(2) A transferor by delivery is not liable on the instrument.

(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

Besides not being liable on the instrument, a transferor by delivery is not liable on the consideration in respect of which he gave the bill if the instrument is dishonoured, unless the bill was given in respect of an antecedent debt (see page 231), or it is shown that the transfer of the instrument was a conditional payment only and was not intended to operate as a full and complete discharge of the transferor's liability. But in order that the transferee may be able to sue the transferor in either of these cases, he must exercise reasonable diligence in endeavouring to obtain payment of the instrument and in giving notice of dishonour, or he must repudiate the transaction within a reasonable time. It follows from these considerations that if a banker discounts a bill indorsed in blank for a holder who does not indorse the instrument, the holder is not liable if the in-

strument is dishonoured, for he is not liable *on the instrument itself*, and it does not fall within either of the exceptions referred to above.

In connection with Sub-section 58 (3), it must be noted that, unlike the warranties assumed by the acceptor, drawer and indorser under Sections 54 and 55 of the Act, a transferor by delivery merely incurs liability in respect of a statutory warranty that the bill is genuine and that he has a right to transfer it, and his liability is only to his *immediate* transferee (who must be a holder for value) and not to any subsequent holder. Moreover, if the transferee discovers any defect in the bill he must repudiate the transaction within a reasonable time if he is to hold the transferor liable.

Thus, in *Fuller v. Smith*, 1824, a banker discounted for a bill broker a bill indorsed in blank by the payee. Subsequently it was found that the signature of the drawer and acceptor were forged by the payee who had absconded, and it was held that the bank could recover the amount of the bill from the broker who was liable as a transferee for the genuineness of the instrument. But in *Ex parte Bird*, 1851, a banker discounted for an agent a bill drawn and indorsed in blank by his principal. The agent did not indorse the bill and handed over the money received to his principal. Unknown to the agent, his principal had forged the acceptance of the bill, and when the principal became insolvent the bankers sought to make the agent liable. It was held that they could not recover from the agent as he was not the transferor of the bill.

## CHAPTER 17

### THE DISHONOUR AND DISCHARGE OF BILLS OF EXCHANGE

As pointed out in the preceding chapter, the important duties of the holder of a bill are to present it to the drawee for acceptance and thereafter to present it for payment on the due date. Serious consequences ensue if these duties are not properly discharged, but if they are correctly carried out in the manner prescribed by the Bills of Exchange Act, and acceptance or payment is refused, the bill is said to be *dishonoured*, in the one case by non-acceptance and in the other case by non-payment.

#### Dishonour of a Bill by Non-Acceptance.

Although at law the validity or the negotiation of a bill is not affected by the absence of the acceptance of the drawee, it is usual, for reasons already discussed, for the holder to present the bill for acceptance as soon as possible, so that the liability of the drawee on the instrument may be ensured. The drawee is not a party to the bill or liable thereon to any party until he has signed it, although he may be liable to the drawer in respect of the consideration for which the bill was drawn. If the drawee does not accept on due presentation by the holder, the bill must be treated as dishonoured, in accordance with Section 42 :—

42. (1) When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

The term "customary time" is somewhat vague, but is taken to mean that if a bill is left for acceptance during business hours on one day and is not accepted before the close of business on the next day, it is to be treated as dishonoured by non-acceptance. Presumably, therefore, the drawee is entitled to have about twenty-four hours during which to make up his mind whether to accept or to refuse to accept the bill. In reckoning the twenty-four hours, "non-business" days must be excluded. It is not the duty of the acceptor to send the bill to the holder after acceptance or refusal to accept; it is the holder's duty to call for the instrument and to enquire whether it has been accepted or not. The circumstances in which a bill

may be treated as dishonoured by non-acceptance are thus set forth in Section 43 of the Act :—

43. (1) A bill is dishonoured by non-acceptance—

- (a) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained ; or
- (b) when presentment for acceptance is excused and the bill is not accepted.

(2) Subject to the provisions of this Act when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holders, and no presentment for payment is necessary.

Dishonour by non-acceptance may therefore take place by (i) a refusal on the part of the drawee to accept ; (ii) an omission on the part of the drawee to accept within the customary time after presentment ; (iii) the giving of an acceptance which is not in accordance with the Act ; or (iv) non-acceptance when presentment to the drawee is excused [Section 41 (2)]. Thus the holder's right of recourse against prior parties applies whether the bill has actually been presented for acceptance or not. Acceptance "such as is prescribed by the Act" may be either general or qualified (Section 19), but by virtue of Sub-section 44 (1) :—

44. (1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

The conditions in which the drawer and indorsers are discharged if the holder takes a qualified acceptance have been discussed in the previous chapter.

Sub-section 43 (2) gives the holder an immediate *right of recourse* against the drawer and indorsers on the dishonour of a bill by non-acceptance. This is not exactly identical with an immediate *right of action*, since the right of recourse becomes a right of action only when any conditions precedent to the right of action as laid down in the Act have been complied with, e.g., the giving of notice of dishonour, or protesting when necessary. When these conditions precedent have been complied with, however, there is an immediate right of action against the drawer and indorsers, and there is no need for the holder to present the bill for payment at the due date before commencing such an action.

By virtue of Sub-sections 18 (2) and (3) a bill may be accepted after it has been previously dishonoured if such is the fact, but in such circumstances it is clearly within the holder's option to permit the drawee to accept or not.

### Dishonour by Non-Payment.

On its due date a bill must be presented for payment by the holder to the acceptor, and if payment is refused, the circum-



stances in which the bill may be treated as dishonoured by non-payment are thus defined in Section 47 :—

47. (1) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

The provisions referred to in Sub-section 47 (2) are those relative to acceptance and payment for honour contained in Sections 65 to 68 inclusive. (See below.)

It will be observed that the consequences of dishonour by non-payment are precisely the same as in the case of dishonour by non-acceptance. The holder has an immediate right of action against the drawer and indorsers, subject to his complying with any conditions precedent, such as giving notice of dishonour and protesting where necessary. There is, however, one point of difference. Whereas on dishonour by non-acceptance there is no right of *recourse* against the *drawee*, since he is not a party on the bill, in the case of dishonour by non-payment there is an immediate right of *action* against the acceptor, for the drawee has become a party to the bill by virtue of his acceptance. And this right to proceed against the acceptor is not subject to any conditions precedent, as in the case of a right of action against the drawer or indorsers, for he is not entitled to notice of dishonour or to have the bill protested on dishonour, for by Section 52 (3) of the Act :—

52. (3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

Action on a bill dishonoured by non-payment cannot be taken until after the expiration of the last day of grace, and the right of action is limited, as in the case of any other simple contract, to six years from the time when the right of action first arises, i.e., six years from dishonour on the last day of grace. Moreover, right of action against the drawer or indorsers does not arise until notice of dishonour has been or ought to have been received by them, and in any case there is no right of action against such parties until the day *after* the dishonour of the instrument.

### Notice of Dishonour.

The giving of due notice of dishonour to the prior parties to a bill is one of the conditions precedent to the conversion of the holder's right of recourse against such parties into a right of action in the case of dishonour either by non-acceptance or by non-payment. Section 48 provides that :—

48. Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must

be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged; Provided that—

(1) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission.

As already stated, notice of dishonour is required only to charge the drawer and indorsers, but the acceptor need not be notified.

By virtue of Sections 39 and 46 (2) there are certain circumstances in which presentment for acceptance or payment is unnecessary in order to charge the drawer and indorsers, but if the holder chooses to make presentment in either case, and the bill is dishonoured, he must give the requisite notice of dishonour, unless such notice is dispensed with in accordance with the provisions dealt with below.

If a bill is dishonoured by non-acceptance and is subsequently negotiated, the transferee may or may not be aware of the dishonour. But unless such a transferee is a holder in due course and, therefore, protected by Sub-section 48 (1) above, he will be prejudiced by the omission to give due notice of dishonour and unable to sue any parties who have been discharged by the omission to give such notice. It follows from this provision that the holder of a bill dishonoured by non-acceptance is not bound to take action thereon against the drawer, but even if he does not do so and negotiates the instrument, he will ultimately be himself liable for its due payment to a subsequent holder.

By virtue of Section 48 (2) :—

48. (2) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

In illustration of this Sub-section we may consider the case where a three months' bill in the hands of a holder X is dishonoured by non-acceptance. Instead of immediately exercising his rights of recourse against the drawer and prior indorsers, X gives them notice of dishonour and retains the bill until maturity, when he presents it to the drawee for payment. The bill is again dishonoured, but X need not give the drawer and indorsers notice of the dishonour by non-payment, for his previous right of recourse holds good in accordance with the sub-section. If, however, the bill has in the meantime been accepted by the drawee, it will be necessary for X to give the drawer and indorsers notice of the subsequent dishonour by non-payment, if he is to retain his rights against them.

### Dishonour by <sup>ing</sup> Notice of Dishonour.

On its due date, a holder in due course gives notice of a valid and effective notice of dishonour to the drawer and indorsers, in accordance with Section 49 of the Act, and may be considered

under five headings : (a) Who must give notice ; (b) Who benefits by the notice ; (c) The form of notice ; (d) To whom notice must be given ; (e) Within what time notice must be given.

### Who Must Give Notice of Dishonour.

In this connection Sub-sections 49 (1) and (2) of the Act provide :—

49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules :—

- (1) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.
- (2) Notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice whether that party be his principal or not.

From a consideration of these provisions it will be observed that notice must be given by or on behalf of the holder, so that notice by a stranger to the bill, unless he purports to act as agent for the holder, would be no notice so far as the person sought to be charged was concerned. But if notice is given by a person who purports to act as agent, the giving of notice may be ratified by the principal and so made effective. Thus, in *Stewart v. Kennett*, 1809, a bill in the hands of a holder A was dishonoured. The bill bore X's indorsement, but notice of dishonour was not given to him by A, although X heard of the dishonour through a stranger B. The notice was held to be ineffectual to hold X liable as it was not given by or on behalf of the holder, and X was accordingly discharged. If, however, B in giving the information to X had purported to act on behalf of A, then A could have ratified B's act and so have held X liable.

Again, when notice is given by or on behalf of an indorser, it must be an indorser who is liable on the bill at the time of the notice, so that an indorser *sans recours*, or an indorser who has himself been freed from liability by delay in giving notice by the holder, cannot give notice of dishonour. Thus, suppose A, B and C are successive indorsers of a dishonoured bill, and C gives notice too late to B only. B cannot make up for the delay by at once giving notice to A, for B, having been discharged by C's delay in giving him notice, is in the position of a mere stranger and cannot give an effectual notice to A.

In regard to Sub-section 49 (2), if A, B and C are successive indorsers of a dishonoured bill, and C's agent gives notice to A, either on behalf of C or on behalf of B, the notice will be valid and effectual.

### Who Benefits by Notice of Dishonour.

Sub-sections 49 (3) and (4) of the Act provide that :—

49. (3) Where the notice is given by or on behalf of the holder, it

enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

Thus, in regard to Sub-section 49 (3), A, B, C and D are successive indorsers of a bill. When the bill is dishonoured, D gives notice of dishonour to A, and then indorses the bill to E. B, C and E each receive the benefit of the notice, for E is a "subsequent holder", while B and C are prior indorsers with a right of recourse against A. Again, by virtue of Sub-section 49 (4), if A, B, C, D and E are successive indorsers of a bill, and notice of dishonour is given by D to A, the notice enures for the benefit of the holder E, and of B and C, who are indorsers subsequent to A.

### The Form of Notice of Dishonour.

The manner in which notice of dishonour must be given is thus laid down in Sub-sections 49 (5), (6) and (7) of the Act:—

49. (5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.

(6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

(7) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

Chalmers points out that notices of dishonour are now construed very liberally, and that since 1841 it does not appear that any written notice of dishonour has been held to be bad on the ground of insufficiency in form. The notice will be adequate whether it is given orally or in writing, or partly one and partly the other, so long as the bill which is dishonoured is sufficiently identified that the party receiving the notice will have no difficulty in understanding its purport. For example, in *Metcalfe v. Richardson*, 1852, the office clerk of the holder of a dishonoured bill informed the drawer verbally that the bill had been presented but that the acceptor could not pay, and in reply the drawer said that he would see the holder about it. It was held that this was sufficient notice to the drawer, and given in sufficient form. Again, in *Bain v. Gregory*, 1866, the drawer of a bill accepted by B was informed "Yours and B's note of hand is now due, and your attention to the same will oblige". This notice was held to be sufficient.

The following is a useful form of notice:—

NOTICE OF DISHONOUR

22 West Street,  
Northtown,  
17th September, 19...

To: *James Brown,*  
17 East Street, Northtown.

Please take notice that a bill, particulars of which are given below, upon which you are liable as drawer (or indorser) has been dishonoured by non-acceptance (or non-payment). I request immediate payment of the amount of the said bill, £100, plus expenses.

THOMAS ROBINSON (Signature).

Particulars:

AMOUNT: £100. DATE: 14th June, 19... TENOR: 3 Mos. DUE: 17th Sept., 19...  
DRAWER: *William Arnold.* ACCEPTOR: *Henry Jones.*  
PAYABLE AT: *Northern Bank, Northtown.*  
INDORSERS: *James Brown, Walter Martin, John Rippen.*  
ANSWER GIVEN: *Refer to Drawer.*

ALTERNATIVE FORM OF NOTICE OF DISHONOUR

I beg to give you notice that a bill for £170, 10s., dated the 1st June, 19... drawn by *James Brown* upon *Andrew Sims*, payable *three months after date* and indorsed by you has this day been dishonoured by non-acceptance (or non-payment).

THOMAS ROBINSON.

4th September, 19...

Sub-section 49 (5) recognises as legal the common practice, particularly in the case of collecting-bankers, of returning a dishonoured bill or cheque to a party liable, instead of sending formal notice of dishonour.

Examples of notices which may be sufficient under Section 49 (7), although they have misdescribed the bill, are: (a) A notice, sent to the drawer, which referred to the bill as payable at the "X Bank" although in fact it was payable at the "Y Bank"; (b) A notice which described a bill of exchange as a "note"; (c) A notice which reversed the names of the drawer and acceptor; and (d) A notice which described the acceptor by a wrong name.

Notice of dishonour may be sent by post, and by Sub-section 49 (15) it is expressly provided that the notice is not made ineffective so far as the sender is concerned by reason of the fact that it is lost in the post:—

49. (15) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.

Apart from this proviso, it would appear that notice of dishonour must reach the party to whom it was addressed.

To Whom Notice of Dishonour must be Given.

Sub-sections 49 (8), (9), (10) and (11) provide that:—

49. (8) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

(9) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

(10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

The Act does not specify *the place* at which notice must be given, but it would appear that, where the party to be notified is a trader, notice is effectual if left at or forwarded to his place of business, while if such party is not a trader, notice should be sent to or left at his private residence. In any case, it is the duty of the drawer or indorser if he is absent from his place of business or residence, to see that there is someone at that place who may accept notice on his behalf.

It has been held that in the case of a merchant, notice left with his clerk at his place of business is sufficient, and that such notice may be verbal or written. Again, in the case of a non-trader, verbal or written notice left with a wife in her husband's absence at his private house has been held to be sufficient.

### Within What Time Notice must be Given.

The provisions of the Act with reference to the time within which notice of dishonour must be given are thus set forth in Sub-section 49 (12) :—

49. (12) The notice may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

- (a) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.
- (b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

Thus a bill is dishonoured on Monday, and A the holder desires to give notice of dishonour to the previous indorser, B. If they reside in the same town, A must deliver or post the notice so that it reaches B not later than Tuesday. If, however, A and B do not live in the same town, then A must post the letter of notice not later than Tuesday, unless there is no post on that day, when he must send off the letter by the first post thereafter. By virtue of Section 92 of the Act, no reckoning need be made of "non-business days" in estimating the correct time for giving notice of dishonour, so that if, in the foregoing example, the bill had been dishonoured on the Saturday, A need only send off or

give his notice so that it reaches B not later than the following Monday.

The provisions of Sub-section 49 (12) above apply only *in the absence of special circumstances*, and evidence is admissible to show that notice was in fact given within a reasonable time. Thus in *Lindo v. Unsworth*, 1811, delay in giving notice was excused where the holder, a Jew, would have desecrated a sacred Jewish holiday if he had given notice on the day as required by the Act. Moreover, the Sub-section is liberally construed as far as possible in favour of the validity of the notice. Thus, in *Fielding v. Corry*, 1898, a bill was sent by a branch to a London bank for collection. The bill was dishonoured, and by mistake the notice was sent to the wrong branch, but on discovering the error, the London Bank at once wired to the correct branch advising the dishonour, the telegram reaching the branch within the same time as the letter would have been received if it had been properly addressed. The notice was held to be valid.

It should be noted also that by virtue of Sub-section 49 (15) (*ante*, page 425), a person who sends notice by post is deemed to have given notice within the proper time notwithstanding any delay which may arise in transit, provided, of course, that the notice is posted within the necessary time.

**BILL IN THE HANDS OF AN AGENT.**—Sub-section 49 (13) explains when notice of dishonour must be given if a bill is in the hands of an agent :—

49. (13) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

This Sub-section is of special importance to bankers, who so frequently have to make use of the services of agents in presenting bills for collection and payment. By virtue of its provisions, the Head Office of a bank and each branch have the same time within which to give notice of dishonour as any party liable on the instrument. Thus, a bill payable in London is left by the holder with a country branch, by which it is sent to its London office for presentment for payment. The bill is dishonoured, and notice of dishonour is sent off on the same day by the London Office to the country branch. The latter can send off notice to the holder within the time allowed by Sub-section 49 (12), i.e., if he receives the notice on Tuesday, and the customer resides in the same place, the customer must receive notice not later than Wednesday; but if the customer resides in a different place, the notice must be sent off on Wednesday if there is a convenient post on that day, but if not, it must be sent off by the first convenient post.

Again, the branch of a Lancashire bank having its Head

Office in Manchester receives from a customer a bill for collection payable in London. The branch forwards the bill to the Manchester office, by which it is forwarded to a London agent for presentation on the due date. The bill is dishonoured and notice is given by the London agent to the Manchester office, which passes on the notice to its branch to be transmitted to the holder. The notice is sufficient, for the London agent, Head Office and branch are to be considered as separate and distinct parties for the purpose of giving notice of dishonour.

**NOTICE GIVEN BY A PARTY.**—By virtue of Sub-section 49 (14) a similar rule applies in the case of each party to the bill :—

49. (14) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

This means that each party who receives due notice is placed in a similar position to that of the holder of the bill for the purpose of giving notice to prior parties. Thus, A, B and C are successive indorsers of a bill, C being the holder in whose hands it is dishonoured. C gives due notice to B, and thereafter B has the same time within which to give notice to A as if he (B) were the holder of the bill. But if B does not give due notice to A, A will be discharged, so that if the holder wishes to be absolutely sure of his rights against A as well as against B, his best plan is to give notice to both.

This explains a most important general principle, that if a holder wishes to secure his rights against *all* prior parties to a bill, he should give notice to remote parties as well as to the party immediately preceding him in order of liability. Thus, A, B, C and D are successive indorsers of a bill, D being the holder in whose hands the bill is dishonoured. D gives due notice to C, C to B, and B to A, so that D's rights against A, B and C are secured. But if B is one day late in giving notice to A, A will be discharged as against B, C and D, so that D's best plan is to give notice to A, B and C. It follows also that an intermediate party, such as C, can safeguard his rights against all prior parties only by himself giving notice to them all, unless, of course, he knows that due notice has been given to all such parties by the holder, or unless he knows that notice will be duly passed on by the parties who precede him in order of liability.

It must be observed, however, that if a holder, such as D in the foregoing example, decides to give notice to all prior parties, he must give such notice to *all* within precisely the same time as he is allowed to give notice to his immediate party, i.e., he must give notice to A within the same time as he is allowed for giving notice to C, in spite of the fact that if D merely relies on the other parties to pass on the notice, the notice may not reach A until one week from the time when the bill was dishonoured.



### Delay in Giving Notice of Dishonour.

It is essential in order to complete the right of action against the drawer and indorsers that notice of dishonour be given within a reasonable time as defined in Sub-section 49 (12), since delay may so alter the position of these parties that they could defend any action brought against them by pleading "laches" on behalf of the holder.

Sometimes, however, the holder is unable, through no fault of his own, to give notice within a reasonable time, and in such cases the delay in giving notice is excused by Section 50 (1) of the Act :—

50. (1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

A common cause of delay is that the holder does not know the address of the party to whom notice is to be given, in which case reasonable diligence must be used by the holder to determine the address, and any delay caused by making proper and necessary enquiries to find the indorser will be excused. Thus, in the case of *The Elmville*, 1904, notice had to be given to the drawer of a dishonoured bill who was the master of a ship. The holder took from Monday until Thursday to find out where the ship was and then sent notice to the drawer by registered post. The notice was held to be in time and the delay was excused. Delay may also be caused because the drawer or an indorser has given a wrong address, in which case any delay caused by such default of the indorser will be excused. Where notice of dishonour is forwarded by post, any delay caused by postal transit will be excused.

From the above Sub-section it would appear that, where the delay in giving notice of dishonour is caused by the negligence of the party to whom notice is sent, then although the delay will operate in favour of the sender and consequently make the recipient liable, such person will be unable to give an effectual notice to prior parties, i.e., he must suffer any loss which may arise by reason of his own negligence.

### When Notice of Dishonour is Dispensed with.

As a general rule, the giving of due notice of dishonour is essential to convert the holder's right of recourse into a right of action, but notice is excused in certain circumstances detailed by Sub-section 50 (2) of the Act :—

50. (2) Notice of dishonour is dispensed with—

(a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged :

- (b) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice :
- (c) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment :
- (d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

The fact that a party sought to be charged has reason to expect that when presented the bill will be dishonoured, will not excuse the holder from giving him notice of dishonour, so that, even if the party to be charged knows that the acceptor is dead or bankrupt, the holder must still give the personal representatives or the trustee due notice.

Circumstances dispensing with notice of dishonour under Clause (a) would arise where the holder goes to a party's place of business in order to give the requisite notice, but finds the place shut up and no one there to receive the notice or to answer enquiries, or where notice is sent off by post within the prescribed period but fails to reach the party sought to be charged. On the other hand, if an indorser's address is not given, the fact that the holder, although he makes some enquiry, does not take such steps as he reasonably might have done, will discharge the indorser concerned. Moreover, circumstances which would excuse delay in giving notice of dishonour will not entirely dispense with notice. Thus, in one case the drawer of a dishonoured bill could not be found at the address given on the instrument, but before the holder brought his action he was informed of the drawer's address. Notice of dishonour had to be given before the action was brought, otherwise the drawer would have been discharged.

If an indorser waives notice of dishonour it will operate in favour of parties *subsequent* to that indorser and also in favour of any holders subsequent to the holder whose duty is waived, but it will not affect any parties prior to the indorser. Express waiver of notice of dishonour within the meaning of Clause (b) may arise where an indorser writes after his signature "Notice of dishonour waived". As to what is implied waiver must be determined from the circumstances. Thus, if the drawer of a bill informs the holder that it will not be paid on presentment, this would operate as waiver of notice as far as concerns the drawer. Again, a party to a bill who has not received due notice of dishonour informs the holder that he will see that the instrument is paid. This amounts to an implied waiver of notice of

dishonour. Waiver of notice will also be implied if a party who has not received due notice makes a promise to pay if the holder will give him time. But there will be no waiver if such a promise is made, or if part payment of the bill is made, *under a mistake of fact*. Thus, in *MacTavish v. Michaels*, 1912, an indorser was not given notice of dishonour, but in the mistaken belief that she was a joint acceptor of the bill, the indorser made a part payment. It was held that there was no waiver of notice, so that the indorser was discharged and the money paid had to be refunded.

Moreover, in order to be effective, the waiver must be properly made by the party whom it is sought to charge. In *Re Fenwick Stobart & Co.*, 1902, A & Co., Ltd. and B & Co., Ltd., were two companies having the same secretary. A & Co. drew a bill on B & Co. and indorsed it to C. At maturity, B & Co. dishonoured the bill but C gave no notice of dishonour to A & Co. It was held that since there had been no waiver of notice, the fact that the common secretary knew of the dishonour was immaterial, so that A & Co. were discharged from liability by the failure to give them notice.

The provisions of Clause (c) are self-explanatory, but it may be noted that, although in the case of the dishonour of a cheque by reason of insufficient funds, notice to the drawer is excused by virtue of Clause (c, 4), this does not excuse notice of dishonour to any indorsers of the cheque.

Clause (d) applies only to the indorser of a dishonoured bill, but its provisions are also reasonably clear. A case illustrating this clause was that of *Cavunt v. Thompson*, 1849, where the indorser of a bill became the executor of the acceptor. On maturity of the bill it was presented to the indorser for payment in his capacity of executor and was dishonoured by him. It was held that the indorser was not entitled to notice of dishonour by the holder.

It may be added that if action on a bill cannot be taken because the instrument is unstamped or insufficiently stamped, then there is no need to give notice of dishonour, since the only action which can be brought is not on the bill itself, but on the consideration for which it was given.

### Notice of Dishonour to Acceptor or Maker, or to Guarantor.

By virtue of Sub-section 52 (3) (see below), notice of dishonour need not be given by the holder either to the acceptor of a bill or to the maker of a promissory note. Nor is the holder liable for not giving notice to a person who is not a party but has given a separate bond or guarantee to secure due payment of the instrument by the party primarily liable thereon, although it is, of course, very desirable that notice should be given in such cases. On the other hand, it is generally necessary to give notice of dishonour to any person, who, although not a party to

the bill, is nevertheless liable on the consideration in respect of which the bill was given.

### NOTING AND PROTESTING A BILL

When it is desired to bring action on a dishonoured bill it is usual to obtain authentic proof that the bill has been properly presented and that it has been dishonoured by non-acceptance or non-payment. By obtaining this proof the holder provides evidence of the dishonour sufficient to satisfy any tribunal at home or abroad, and also affords any party liable on the instrument such unimpeachable evidence of dishonour as he is fairly entitled to demand before he can be called upon to pay the bill.

The first step in securing this official proof is obtained by "*noting*" the bill, a process whereby a notary public<sup>1</sup> (generally a solicitor), attests to the dishonour of the bill by the drawee or acceptor, as the case may be. The process of noting is usually as follows. The holder, first of all, presents the bill for acceptance or payment in the usual way and, if it is dishonoured, he obtains the services of a notary, whose clerk again presents the bill to the party by whom it should be accepted or paid as the case may be, and, if it is again dishonoured, makes a note or "*minute*" of the following items: (a) the initials of notary; (b) the date; (c) the charges for noting; and (d) a reference or mark to the register of the notary, where a copy of the bill and the particulars of the noting are kept. The notary also attaches to the bill a slip on which is written the answer, if any, given by the drawee or acceptor upon presentation of the bill by the notary's clerk, as, for example, "Payment refused", "Acceptance refused", "No orders", "Refer to Drawer", "No advice", "Orders not to Pay", "No effects".

The noting of a bill is usually, though not necessarily, merely a preliminary step to the "*protest*" of a bill, which may be defined as "a formal declaration in writing made by a notary public that the bill has been refused acceptance or payment, and that the holder intends to recover all the expenses to which he may be put in consequence thereof". Noting is, in fact, merely an incipient protest and is unknown in law apart from the protest; the notary having made his minute of the proceedings of dishonour, draws up his protest (if it is required) at his leisure.

As will be seen later, the protest is in the form of a stamped, sealed certificate of the notary testifying to the presentation and

<sup>1</sup> The business of a notary includes the making of wills, the drawing up of powers of attorney, bonds of arbitration, bills of sale, charter parties, etc., and also attesting the truth of any deed or documents in writing in order to provide unimpeachable proof of their authenticity. Some notaries are occupied almost entirely in drawing up instruments of various kinds, while the chief business of others consists in the noting and protesting of bills of exchange and promissory notes.

dishonour of a bill. Such certificate will be accepted as evidence of the facts it contains in any country, and it is clearly highly desirable that a bill which bears foreign indorsements should be protested in order that any foreign parties thereon (and any foreign Courts in which action is to be taken) may have reliable and unimpeachable evidence of the dishonour of the instrument concerned. It is for this reason that, although noting is desirable in the case of inland bills, protest is made *compulsory* only in the case of foreign bills.

### Noting and Protesting Inland Bills.

Although the holder generally arranges to have a dishonoured inland bill noted, it is not compulsory either at common law or by statute that he should do so in order to complete his right of action on the bill, for by Section 51 (1) of the Act it is provided that :—

51. (1) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

Nevertheless, if the holder chooses to note an inland bill on dishonour, he may recover any expenses so incurred from any parties liable on the bill, by virtue of Section 57 of the Act (see page 439). But, although there is nothing to prevent the holder of any bill from protesting it on dishonour if he so desires, the expenses of protest can be recovered only where protest is compulsory under the Act. This matter is dealt with below.

### When Protest is Essential.

Protest is essential on the dishonour of *foreign* bills before any action can be taken against any of the parties liable thereon, for by Sub-section 51 (2) of the Act, it is provided that :—

51. (2) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance, it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary.

It will be observed that the Sub-section provides that the bill must appear *on the face of it* to be a foreign bill, so that protest is unnecessary in the case of a bill which may be treated as an inland bill by virtue of Sub-section 4 (2). Consequently, if a bill is really a foreign bill, but this fact is not obvious on the face of the instrument, protest will not be necessary in order to maintain action thereon.

By Sub-section 44 (2), a foreign bill which has been accepted

as to part only of the amount for which it is drawn must be protested in respect of the unaccepted balance ; in other words, the bill must be regarded as dishonoured for the amount which the drawee will not undertake to pay.

Sub-section 51 (2) only makes it *compulsory* to protest a foreign bill *once*, either on dishonour by non-acceptance or on dishonour by non-payment, but if a bill is protested for non-acceptance, Sub-section 51 (3) of the Act gives the holder the option of obtaining a second protest on the dishonour of the instrument by non-payment :—

51. (3) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

Such a protest as is provided for by this Sub-section may be necessary in order to charge a foreign drawer or indorser in his own country, for the law in most foreign countries does not recognise protest for non-acceptance as excusing protest on subsequent non-payment.

Failure to protest a foreign bill will discharge the drawer and indorsers, but the liability of the acceptor is unaffected, for by Sub-section 52 (3) :—

52. (3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

Protest of an *inland* bill is necessary only in four specific cases : (a) as a preliminary to acceptance of the bill for honour ; (b) as a preliminary to payment of the bill for honour ; (c) for purposes of summary diligence in Scotland ; (d) after dishonour by non-payment by an acceptor for honour. These matters are dealt with hereafter.

### The Time of Protest.

The provisions of the Bills of Exchange Act, 1882, relative to the time for noting or protesting a bill, are contained in Sub-section 51 (4) :—

51. (4) Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

This Sub-section has, however, been amended by Section I of *The Bills of Exchange (Time of Noting) Act, 1917*, which provides :—

1. In sub-section (4) of section fifty-one of the Bills of Exchange Act, 1882 (which relates to the time of noting a dishonoured bill), the words " it must be noted on the day of its dishonour " shall be repealed, and the following words shall be substituted therefor, namely, " it may be noted on the day of its dishonour and must be noted not later than the next succeeding business day."

It follows that a dishonoured bill must be noted not later than the business day following the day of dishonour, but by virtue of Section 93 of the Act the formal protest (where it is required) may be extended at any subsequent time and antedated to the date of noting :—

93. For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

(Refer to sections 65 to 68.)

The words " at any time thereafter " in this section must be taken to mean at any time before action is brought on the instrument, although presumably a protest will be valid even though it is not extended until the action has actually commenced.

### The Place of Protest.

As a general rule, a bill must be protested at the place where it is dishonoured, but to this rule two exceptions are specified in Sub-section 51 (6) of the Act :—

51. (6) A bill must be protested at the place where it is dishonoured :  
Provided that—

- (a) When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day :
- (b) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

Clause (a) affords legal recognition to the common practice of Liverpool notaries in regard to bills drawn on Lancashire cotton spinners. Thus, the holder of a bill who resides in Liverpool posts the instrument to the drawee in Burnley for acceptance. The bill is refused acceptance, and the holder receives it by post on the day following dishonour. He may protest it in Liverpool on that day, although it was actually dishonoured in Burnley on the previous day. If, however, the bill is not received back in Liverpool during business hours on a business day, the protest may be extended not later than the succeeding business day.

An example falling within Clause (b) would be that of a bill drawn on X in Burnley but made payable in Liverpool. The bill is duly presented for acceptance at Burnley but is dishonoured. On the day of maturity it must be protested for non-payment in Liverpool without any further presentment to, or demand upon, the drawee X.

## Requisites as to Form of Protest.

Sub-section 51 (7) of the Act provides that :—

51. (7) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—

- (a) The person at whose request the bill is protested :
- (b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

In addition to these provisions, Section 90 of the Stamp Act, 1891, provides that a protest must be stamped. Accordingly, there would appear to be *seven* essential requisites of a protest : it must contain (1) an exact copy of the bill ; (2) a statement of the parties for whom and against whom the bill is protested ; (3) the date of protesting and the place where protest is made ; (4) a statement that acceptance or payment was demanded by the notary, together with the terms of the answer, if any, or a statement that no answer was given, or that the drawee or acceptor could not be found ; (5) a reservation of rights against the parties liable ; (6) the seal or signature of the notary making the protest ; (7) the necessary revenue stamp (see Chapter 26).

The following is a form of protest, which may be in duplicate or triplicate, and bears a copy of the bill on the back :—

### PROTEST OF A BILL FOR NON-ACCEPTANCE

On this the 7th day of *September*, One thousand nine hundred and . . . . ., at the request of *James Brown*, of the City of *Birmingham*, *Grocer*, and holder of the original bill of exchange, a true copy of which is on the other side written, I, *Thomas Robinson*, of the said City, Notary Public, by lawful authority duly admitted and sworn, did produce and exhibit the said original bill of exchange to *Henry Abbott*, on whom it was drawn, at 17 *East Street, Northtown*, for his acceptance, and demanded acceptance thereof, to which he replied that "Reference should be made to the Drawer, *William Burns*."

Wherefore I, the said Notary at the request aforesaid, did protest and by these presents do solemnly protest against the drawer of the said bill of exchange and all other parties thereto, and all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, charges and interest already incurred and to be hereafter incurred by reason of the non-acceptance of the said bill of exchange.

Thus done and protested at *Birmingham*,

in the presence of—

*Andrew Bennett,*  
21 *Park Drive,*  
*Birmingham,*  
*Clerk.*  
*Fred Barnes,*  
11 *The Causeway,*  
*Birmingham,*  
*Clerk.*

Witnesses.

Dated this 7th Day of *September*, One thousand nine hundred and . . . . .  
Which I attest,

*Thomas Robinson,*  
Notary Public,  
L. 179.

SEAL



The protest of a bill for non-payment is almost identical in form, with the necessary modifications to cover non-payment instead of non-acceptance.

### Delay in Protesting.

The circumstances in which delay in obtaining a protest are excused are thus provided for by Sub-section 51 (9) :—

51. (9) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

Consequently, there is no need to protest a bill in those circumstances, prescribed by Section 50 (3) of the Act, where notice of dishonour is dispensed with. The mere fact that delay in protesting a bill will be excused under the above sub-section does not dispense with protest, so that when the cause of delay ceases to operate the protest must be made.

### Protest of a Lost Bill.

The fact that a bill is lost or destroyed does not excuse the holder from his duty to protest, for by Sub-section 51 (8) :—

51. (8) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

### Householder's Protest.

It sometimes happens that the services of a notary cannot be obtained at the time when, and at the place where, the noting or protest of a bill is required, and to cover such circumstances Section 94 of the Act provides that :—

94. Where a dishonoured bill or note is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

The form given in Schedule 1 to this Act may be used with necessary modifications, and if used shall be sufficient.

The following is a form of the certificate referred to in the above section :—

## FORM OF HOUSEHOLDER'S PROTEST

Know all men that I, *James Brown* (householder), of *17 East Street, Northtown*, in the county of *Northshire*, in the United Kingdom, at the request of *Thomas Robinson*, there being no notary public available, did on the *17th* day of *June, 19..*, at *11 The Close, Northtown*, demand payment (or acceptance) of the bill of exchange hereunder written, from *Henry Arnold*, to which demand he made answer "Refer to the Drawer," wherefore I now, in the presence of *Andrew Burns* and *Fred Jones*, do protest the said bill of exchange.

(Signed) *James Brown.*

## WITNESSES :

*Andrew Burns,*  
*11 East Street, Northtown,*  
*Grocer.*  
*Fred Jones,*  
*143 North Road, Northtown,*  
*Clerk.*

[The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.]

## Protesting for Better Security.

The right of the holder of a bill to protest the instrument for better security is thus provided for by Sub-section 51 (5) of the Act :—

51. (5) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

By virtue of this Section, the holder *may* arrange for a notary to present the bill to the acceptor and to demand better security for the due payment of the bill in view of his insolvency, etc. On such security being refused, the bill may be protested and notice of the protest may be sent to any antecedent party. Such a protest does not give the holder any right to sue the drawer or indorsers until the bill falls due and is then dishonoured, and on the happening of such an event the ordinary noting (or protest) for non-payment is necessary. The only effect of such a protest is that it provides the necessary preliminary to the acceptance of the bill for honour. (See below.)

A protest for better security reads somewhat as follows :—

## PROTEST OF A BILL FOR BETTER SECURITY

On the *7th* day of *June*, One thousand nine hundred and . . . . ., at the request of *James Brown*, of the City of *Birmingham*, *Grocer*, the holder of the original bill of exchange, a true copy of which is on the other side written, I, *Thomas Robinson*, Notary Public, by lawful authority duly admitted and sworn, did exhibit the said original bill of exchange at the counting-house of *Henry Abbott*, the person upon whom the said bill is drawn, and whose acceptance appears thereon, and did present the same unto a clerk there, and demanded security for the payment thereof when the same should become payable, in consequence of the said *Henry Abbott* having become bankrupt [or having suspended payment], and I received for answer that security for the same could not be given by the said *Henry Abbott*, who has been declared bankrupt [or has suspended payment].

Wherefore I, the said Notary at the request aforesaid, did protest and by these presents do solemnly protest against the drawer of the said bill of exchange and all other parties thereto, and all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, charges and interest already incurred and to be hereafter incurred by reason of the non-acceptance of the said bill of exchange.

Thus done and protested at *Birmingham*,  
in the presence of—

*Andrew Bennett,*  
*21 Park Drive,*  
*Birmingham,*  
*Clerk.*

*Fred Barnes,*  
*11 The Causeway,*  
*Birmingham,*  
*Clerk.*

} Witnesses.

Dated this *7th* Day of *June*, One thousand nine hundred and .....

Which I attest,  
*Thomas Robinson,*

Notary Public,  
L. 179.

SEAL

### Measure of Damages on Dishonour.

The damages which may be recovered by a holder from any party to a dishonoured bill are thus set forth in Section 57 of the Act:—

57. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:

- (1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—
  - (a) The amount of the bill;
  - (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case;
  - (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.
- (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.
- (3) Where by this Act interest may be recovered as damages, such interest may, if justice requires it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

[Interest proper is defined in Section 9 (3).]

It must be observed that Sub-section 57 (1) applies only to bills dishonoured in this country, and that in such cases the damages recoverable are distinctly stated to be *liquidated*. This is a matter of considerable importance to the holder, since it affords him the right to apply for summary jurisdiction on a specially indorsed writ under Order 14, thus saving time and expense in legal action, for the indorsement on the writ clearly shows the nature and extent of the holder's claim against the party whom he seeks to hold liable.

The measure of damages is the same for any party against any party. Interest, usually in the United Kingdom at 5 per cent., unless the bill provides for a specified rate, can only be claimed from the *date of maturity* and not from the date of dishonour, and this is so even in the case of dishonour by non-acceptance. This is because the claim for interest within this sub-section is founded on the right of the holder to damages for *breach* of contract and not on any right to interest as a part of the money payable *in performance* of the contract. Whereas the expense of protest is only recoverable where it is both compulsory and has actually been incurred, the expense of noting can always be claimed even if noting is unnecessary.

Sub-section 57 (2) applies only to bills which are dishonoured abroad: " 'Re-exchange' in its usual application, means the loss resulting from the dishonour of a bill in a country different from that in which it was drawn or indorsed. The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonour, at the *then rate of exchange*, on the place where the drawer or indorser sought to be charged resides) must be drawn in order to realise at the place of dishonour the amount of the dishonoured bill and the expenses consequent on its dishonour. The expenses consequent on dishonour are the expenses of protest, postage, customary commission and brokerage, and when a re-draft is drawn, the price of the stamp. The holder may recoup himself by drawing a sight bill for such sum on either the drawer or one of the indorsers. Such a bill is called a 're-draft'. The indorser who pays a re-draft may in like manner draw upon the antecedent party".<sup>1</sup>

In illustration, we may suppose that Brown of New York sends a bill for £1000 payable in London to his creditor, Robinson of Liverpool. On presentment for payment in London, the bill is dishonoured, and the expenses of noting, etc., amount to £2. Robinson can claim from Brown £1002, and may obtain payment thereof by drawing a sight bill (i.e., a "re-draft") on Brown for that amount in dollars which will yield £1002 when the bill is sold or negotiated. Thus, if the rate of exchange at which Robinson's banker will *buy* sight bills on New York is \$4.76 per £1, the re-draft will be drawn for

$$\$1002 \times 4.76 = \$4770 \text{ (approx.)}$$

The stamp duty on such a sight draft is negligible, but the banker's profit, or "customary commission and brokerage" as provided in the Section, will be included in the rate of exchange.

### Referee in Case of Need.

By Section 15 of the Act it is provided that:—

15. The drawer of a bill and any indorser may insert therein the name

<sup>1</sup> Chalmers, *Bills of Exchange*, 8th edn., page 221.

of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit.

An example of a bill bearing the name of a referee in case of need is given on page 213, *ante*. The referee is sometimes described as a "drawee in case of need" or simply as a "case of need". A referee in case of need is not a party to the bill, although he may become a party thereto by accepting for honour in the manner prescribed in Section 65 of the Act. Moreover, it must be noted that presentation of the bill to a referee in case of need after dishonour by non-acceptance or non-payment is *optional* and not compulsory, but if the holder decides to apply to such a person, he must, first of all, *protest* the bill for non-acceptance or non-payment, whether the bill is an inland or foreign bill. (Section 65, below.)

### Acceptance for Honour.

In accordance with certain provisions of the Act, when a bill has been dishonoured by non-acceptance, *any* person who is not already a party to the bill, is allowed to step in or intervene and accept the bill *instead of the drawee*. Such action is described as "intervention for honour", and has the effect of staying the holder's right of action against the other parties to the bill on its dishonour. Such intervention is also permitted to protect the credit of the drawer or of any other party to the bill, if acceptance of the bill *has been obtained* but it appears unlikely that the acceptor will pay, e.g., where he has become bankrupt and the bill has been protested for better security. (See *ante*, page 438.)

An acceptance of this kind is known as an acceptance for honour *supra protest*, since it can only be admitted after protest of the bill has been extended (or, by virtue of Section 93, after the bill has been noted as a preliminary to protest).

The provisions of the Act relative to such an acceptance are thus given in Section 65:—

65. (1) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra protest*, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2) A bill may be accepted for honour for part only of the sum for which it is drawn;

(3) An acceptance for honour *supra protest* in order to be valid must—  
(a) be written on the bill, and indicate that it is an acceptance for honour;

(b) be signed by the acceptor for honour.

(4) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.


(5) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

It should be observed that a bill which is to be accepted for honour must not be overdue, and must have been protested (whether it is an *inland* or a foreign bill) either for dishonour by non-acceptance or for better security in accordance with Section 51 (5) of the Act. By virtue of Section 93, it is sufficient if the bill has been noted without the protest being actually extended.

As any person may accept for honour who is not already liable on the bill, the drawee can accept for honour although he has previously refused to accept the bill in his capacity as a drawee. In all cases, however, the consent of *the holder* to acceptance for honour is necessary, and unless this consent is obtained the holder may exercise his usual remedies against any party to the bill. It would obviously be inequitable if a holder was not given the option of refusing the intervention of a stranger, when, by reason of that intervention, his rights as a holder are placed in suspense. The Act does not provide for the consent of the party *whose credit is protected*, in spite of the fact that such person and all parties prior to that person become liable to the acceptor for honour if the latter pays the bill.

No special form is required for an acceptance for honour ; it will be quite sufficient if the acceptor for honour writes " Accepted supra protest " or " Accepted S.P. ", followed by his signature. It is usual, however, for the acceptor to state for whose honour he accepts, and if this is not done, the acceptance will be deemed to be given for the honour of the drawer. The following example indicates the usual method of acceptance for honour :—

BILL OF EXCHANGE ACCEPTED FOR HONOUR OF AN INDORSEE

	£1000 0/0	LONDON, 1st January, 19....
	Six months after date the sum of one thousand pounds for value received	To RICHARD JAMES 110 LIME STREET, BRISTOL.
	ACCEPTED FOR HONOUR OF THE DRAWER, RICHARD JAMES 110 LIME STREET, BRISTOL.	JOHN PHILLIPS & SONS. 5th January

The person for whose account the bill is drawn, referred to in Sub-section 65 (1), is sometimes described as the " third account ".

By virtue of Sub-section 65 (2), an acceptance for honour may be for part only of the amount for which the bill is drawn, but it will be observed that there is no provision in the Act

whereby the drawer and indorsers will be discharged if such a partial acceptance for honour is taken, in spite of the fact that the drawer and indorsers are relieved of liability if the holder of a bill takes an ordinary partial acceptance from the drawee.

Although it is not compulsory either by virtue of any statute or at common law, it is the general practice to have an acceptance for honour attested by a notarial act of honour recording the transaction, i.e., the services of a notary are obtained to attest the acceptance for honour. This is the invariable procedure in all cases where it may be necessary to charge a foreign drawer or indorser in his own country. In the case of *payment* for honour such a notarial act is compulsory. (See below.)

Sub-section 65 (5) operates in favour of the holder, for by making the sighting date of a bill payable after sight the date of noting for non-acceptance, and not the date of acceptance for honour, it brings the date of maturity nearer.

### The Liability of the Acceptor for Honour.

Section 66 of the Act provides for the liability of the acceptor for honour and for the warranties which he undertakes, in the following terms :—

66. (1) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

(2) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.

By virtue of Section 93, it is sufficient if the bill is noted for non-payment before it is presented to the acceptor for honour, provided that the protest is subsequently extended as of the date of the noting.

The general rule that the bill must, first of all, be presented to the drawee for payment before it is presented to the acceptor for honour is based on the supposition that, whereas at the time of dishonour by non-acceptance the drawee may not have had funds in his hands out of which he could pay the bill, he may have received such funds or obtained the proceeds of certain effects by the time the bill was due for payment. But it should be noted that this general rule that presentment for payment must be made to drawee is subject to the exception provided for by Sub-section 51 (6b), that a bill made payable at some place other than the residence or place of business of the drawee which has been previously dishonoured by non-acceptance, must be protested for non-payment at the place where it is expressed to be payable without any further demand on the drawee (see *ante*, page 435). Accordingly, in the case of such a bill it may be

protested for non-payment and application made to the acceptor for honour without any presentment for payment to the drawee.

The liability of an acceptor for honour may be illustrated as follows. A bill is negotiated by indorsement to A, B, C and D respectively. X accepts for the honour of B. X will be liable to C and D, but not to B or A or to any party on the bill prior to A.

If an acceptor for honour pays, his rights are the same as those of an ordinary payer for honour. (See below.)

### Presentment for Payment to the Acceptor for Honour or a Referee in Case of Need.

Sub-sections 67 (1), (2) and (3) specify the conditions under which, and the time at which, presentment for payment must be made to an acceptor for honour or to a referee in case of need :—

67. (1) Where a dishonoured bill has been accepted for honour *supra* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

(2) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

(3) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.

As already stated, it is sufficient for the purpose of this Section, as for other purposes where protest is necessary, that the bill be noted and the protest subsequently extended as of the date of noting. It should be remembered that by virtue of Section 15 (see *ante*, page 440), presentment to a referee in case of need is *optional*, so that the holder may, if he so desires, take action against the other parties without first applying to the case of need.

On consideration of the provisions of Section 67 with those contained in Section 66, it will be observed that the right to sue the acceptor for honour is complete only if the following conditions have been fulfilled: (a) There has been due presentment of the bill to the drawee for payment, unless such presentment is unnecessary by virtue of Sub-section 51 (6b); (b) the bill has been protested (or noted as a preliminary to protest) for non-payment; (c) the acceptor for honour has received notice of the aforementioned facts; (d) the bill has been presented to the acceptor for honour for payment.

The position of an acceptor for honour is thus different from that of an ordinary acceptor, for it will be remembered that presentment for payment is not necessary to make the latter



liable unless his acceptance expressly provides that presentment must be made, nor is notice of dishonour or protest of a bill necessary as a condition precedent to the right to sue an ordinary acceptor.

With reference to the time when the bill must be presented to the acceptor for honour for payment, Sub-sections 67 (2) and (3) should be noted.

The circumstances referred to in Sub-section 67 (3), as being sufficient to excuse delay in, or dispense with, presentment for payment, are dealt with in Section 46.

By Sub-section 67 (4) :—

67. (4) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him.

This sub-section specifies one of the four circumstances wherein protest of an inland bill (as well as of a foreign bill) is compulsory. It will be remembered that in the event of dishonour by an ordinary acceptor, protest is necessary only in the case of a foreign bill before action can be taken against the other parties liable.

### Payment for Honour.

The second form of intervention for honour is known as "payment for honour *supra* protest", provided for in Sub-sections 68 (1) and (2) of the Act :—

68. (1) Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

As compared with acceptance for honour, it is to be noted that, in the case of payment for honour, the intervention may be by any person, i.e., including a party already liable on the bill, while there is no need to obtain the consent of the holder. Moreover, acceptance for honour must take place before the bill is overdue, whereas payment for honour necessarily takes place after the maturity of the instrument, *after* the bill has been dishonoured by non-payment by an ordinary acceptor or acceptor for honour. By virtue of Section 93, it will be sufficient in this case also that the bill be noted before payment for honour, provided the protest be subsequently extended.

The object of Sub-section 68 (2) is to ensure that, where there are several offers to intervene for the honour of different parties, the holder shall accept payment for honour from that person whose payment will discharge most parties to the bill.

### Notarial Act necessary to attest Payment *supra* Protest.

It has previously been mentioned that a "notarial act" is not *compulsory* in the case of acceptance for honour, although usual in practice, but in the case of payment for honour *supra protest* Sub-sections 68 (3) and (4) of the Act provide that :

68. (3) Payment for honour *supra protest*, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it.

(4) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

The following is a specimen form of a notarial act of honour on payment of a bill for honour :—

#### NOTARIAL ACT OF HONOUR ON PAYMENT

(To follow the Protest on page 436)

Afterwards on the 8th day of *September*, in the year aforesaid before me the said notary and witness appeared *Mr Henry Atkins*, of *Northtown*, merchant, and declared that he would pay the bill of exchange before protested under protest for the honour and upon the account of the drawer *William Burns*.

Holding, nevertheless, the said drawer and all others concerned always bound and obliged for reimbursement in due form of law and according to the custom of merchants.

Principal	£117 17 0	Which I attest,
Notarial Charges	12 6	<i>Thomas Robinson</i> ,
	<hr/>	Notary Public.
	£118 9 6	L. 179.



Received the 8th day of *September*, 19... from *Mr Henry Atkins*, the sum of *One Hundred and eighteen pounds, nine shillings and sixpence* sterling, the amount of the said bill and notarial charges thereon.

### Effect of Payment *supra* Protest.

Payment of a bill in the ordinary course operates to discharge all parties subsequent to the party by whom payment is made. A somewhat similar effect is obtained in the case of payment *supra protest*, for by Sub-section 68 (5) :

68. (5) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.

In spite of the fact that neither acceptance nor payment for honour requires the consent of the person for whose honour *intervention is made*, the acceptor or payer for honour nevertheless has a right of action against the person whose honour is protected as well as against any parties who are liable to that person. It is in order that the action of the intervener for honour shall be

clearly distinguished from a mere voluntary payment, and in order that his rights may be clearly and effectively preserved as against the person whose honour is protected, that the Act makes necessary the attesting of payment for honour by a notarial act.

Thus, A draws a bill on B payable to C, and the bill is successively indorsed by C, D, and E, to F, the holder. H pays *supra protest* for the honour of C. This payment discharges D and E, while the payer for honour, H, stands in the same position as C, the person for whose honour he paid, i.e., he has a right of recourse against A and B, but he must assume any duties of C in order to complete his right of action against A and B. In addition, H has a right of recovery against C.

Again, if a person intervenes and pays a bill for honour of the acceptor, he obtains no rights as against any parties to the bill except the acceptor. But if a bill is accepted for the honour of the drawer and the acceptor for honour refuses to pay, a payer for honour of the drawer can recover from the drawer, but he has no right of action against the acceptor for honour, for the latter is not a party who is liable to the drawer.

When the acceptor for honour pays a bill for the honour of any party, his payment discharges all parties subsequent to the party for whose honour he *accepts*.

By Sub-section 68 (6) of the Act :

68. (6) The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages.

### Refusal of Payment *supra* Protest.

Whereas the holder of a bill is entitled by virtue of Sub-section 65 (1) to refuse acceptance for honour, he cannot refuse payment for honour without prejudicing his rights on the instrument, for by Sub-section 68 (7) it is provided that :—

68. (7) Where the holder of a bill refuses to receive payment *supra protest* he shall lose his right of recourse against any party who would have been discharged by such payment.

Thus A draws a bill on B payable to C, which is successively indorsed by C, D, and E to F, the holder. H offers to pay F for the honour of C. If F refuses to accept this payment, then C, D and E are freed from liability, but he will still retain his right of recourse against A and B, for they would not have been discharged by the payment of the bill by or on behalf of C.

### The Discharge of a Bill.

In the previous pages an attempt has been made to explain the manner in which a bill functions as a negotiable instrument,

and also the way in which the different rights and liabilities arise thereon. It is now necessary to consider the circumstances in which a bill ceases to operate, and how the rights and liabilities of all the parties come to an end. When this arises the bill is said to be *discharged*.

It must be noted in the first place that there is a vital difference between the discharge of a bill and the discharge of any of the parties thereto. Various circumstances in which a party or parties to a bill may be discharged from liability have already been mentioned, and it will be remembered that the fact that one or more parties to a bill have been discharged does not necessarily involve the discharge of all the parties to the instrument. Thus, the drawer or an indorser may be discharged by the holder's omission to give them due notice of dishonour, but any other indorser to whom such notice is properly given will not be freed from liability. Again, the acceptor of a bill is discharged on obtaining his discharge in bankruptcy, but the drawer and indorsers of the instrument are only discharged, so far as the holder is concerned, to the extent of any dividends which that holder may have received from the estate of the bankrupt acceptor.

It is therefore very necessary to distinguish between the absolute discharge of a bill as a negotiable instrument and the mere extinction of the right of action against one or some of the parties to the bill. As is pointed out by Chalmers: "A bill is discharged when all rights of action thereon are extinguished, It then ceases to be negotiable, and if it subsequently comes into the hands of a holder in due course, he acquires no right of action on the instrument".

The discharge of a bill must also be clearly distinguished from the extinction of any right of action arising out of the bill transaction, although wholly independent of the instrument, for the right of action arising out of the transaction may or may not be extinguished when the bill is discharged. For example, if a bill accepted for the drawer's accommodation is paid by the acceptor, the bill will be discharged, but the acceptor will still have a right of action against the drawer for indemnity in respect of the amount paid. Again, payment of a bill by one of several joint acceptors will discharge the instrument, but the person paying is left with his right of action against his co-acceptors for a contribution in respect of the amount paid.

The Bills of Exchange Act, 1882, enumerates and explains five ways in which a bill may be discharged: (1) By payment in due course; (2) When the acceptor becomes the holder in his own right; (3) By renunciation by the holder; (4) By cancellation by the holder or his agent; (5) By material alteration of the bill.

## Payment in Due Course.

Section 59 of the Act provides :—

59. (1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

“Payment in due course” means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

(2) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but

(a) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill.

(b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

(3) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

Payment must be made in legal tender in accordance with the terms and amount specified in the bill, unless the holder is willing to receive payment in any other form offered by the acceptor, as, for example, an agreement to set-off a debt, or the transfer of a bill drawn by a third party, etc. “Any satisfaction which would operate as a discharge in the case of an ordinary contract to pay money is equally effectual in the case of a bill” (Chalmers).

Payment in due course also means payment made at or after maturity, but whereas payment by the acceptor before that date may operate as discharge as between the parties to the bill, nevertheless, if the bill is subsequently reissued by the acceptor in pursuance of his rights under Section 37 of the Act, any person who takes the bill will have a right of action against any parties whose names appear on the instrument. Thus, in a certain case the acceptor A of a bill paid the holder before the due date and subsequently indorsed the bill to C. It was held that C could sue all the parties to the bill.

Payment must be made to the holder of the bill or to a person duly authorised to receive payment on his behalf, and payment to any person other than the true holder is no discharge. Thus, if a bill made payable to order gets into the hands of a thief who forges the indorsement and presents for payment, then, although payment is made to the thief in good faith, it will not discharge the acceptor from liability to the true owner: for a person who holds a bill under a forged indorsement is not a holder; he is merely a wrongful possessor. On the other hand, if the bill when stolen was payable to bearer, the thief would be a holder and payment to him would be a valid discharge. Moreover, a person whose title is merely defective can give the payer a valid discharge by virtue of Sub-section 38 (3 b).

An exception to the general rule that payment in due course cannot be made to a person who holds under a forged indorsement is provided by Section 60 of the Act, in the case of the payment of cheques by a banker. This matter is treated in Chapter 12.

By virtue of Section 90 of the Act, payment is made in good faith where it is in fact made honestly, whether it is made negligently or not.

Payment in due course must be made by or on behalf of the drawee or acceptor, and payment by another party would not entirely discharge the bill. The fact that a bill payable to a third party is paid by the drawer still leaves him with his right to proceed against the acceptor, while the fact that a bill is paid by an indorser still leaves that indorser with his rights against any prior indorsers, the drawer, and the acceptor. But whereas an indorser on paying a bill may reissue the instrument if he thinks fit, the drawer cannot do so unless the bill is payable to his own order, for a bill which is paid by the drawer, in his capacity as such, is dead, except for his claim thereon against the acceptor.

Thus, a bill is drawn by A and accepted by B, being subsequently negotiated from the payee C to D, E, and F, who successively indorse. F presents the bill to B for payment, but it is dishonoured, and thereafter F applies to the drawer, A, by whom the bill is paid. A can claim against B, but he cannot reissue the bill. On the other hand, if the bill is paid by indorser D, he may, if he thinks fit, strike out his own indorsement and the indorsements of E and F, and again negotiate the instrument. Similarly, if the bill was originally drawn payable to the order of the drawer A, and was paid by him, A would stand in the same position as any other indorser who paid the instrument, so that he could strike out his own indorsement and any subsequent indorsements and again negotiate the bill. It will be clear that if the bill is overdue when it is reissued, no person taking it can become a holder in due course.

There is one exception to the general principle that a bill must be paid by the drawee or acceptor, and that is in the case of an accommodation bill, which by virtue of Sub-section 59 (3) may be discharged by payment *by the party accommodated*. Thus, a bill is drawn and accepted by A and B respectively for the accommodation of a payee C, who indorses the bill to D. Payment by C, the party accommodated, to D, or to any other holder, would discharge the bill, and C would have no right of recourse against either A or B.

Unlike the case of a cheque, there *can* be part payment of a bill by the acceptor, and if such part payment is made it operates as a discharge *pro tanto*.

**Acceptor becomes the Holder in his Own Right.**

Section 61 of the Act provides that :—

61. When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

If a bill is negotiated and comes into the hands of the acceptor as holder in his own right, then since he is both acceptor, i.e., principal debtor, and also a holder, the rights and liabilities on the bill, being vested in the same person, cancel each other, and the bill is therefore discharged. For example, A draws a bill payable to C on B, who accepts. C negotiates the bill to D, by whom it is negotiated back to B, who takes the instrument in his own right and keeps it until maturity. Since B is then both holder and acceptor in the same right the bill is automatically discharged. But if B, the acceptor, becomes the holder at maturity merely as executor, trustee or agent of another person, the bill is not discharged, for the rights of B as acceptor and as executor, etc., are not the same.

It should be added that the acceptor of a bill does not become the holder in his own right within the meaning of this section if his title to the instrument is defective, as, for example, when knowingly or for no consideration he takes the instrument from a person who has obtained it by fraud, or if his title depends on a prior forgery. Thus, in the case of *Nash v. De Freville*, 1900, A gave certain promissory notes payable on demand to B, on the understanding that they were not to be negotiated, but B negotiated the instruments to C, who took them as a holder in due course. Later on, A paid the amount of the notes, but did not demand the delivery of the instruments. Subsequently, B obtained the notes from C by fraud and passed them to A. It was held that A did not become the holder of the notes in his own right, and was therefore liable thereon to C.

**Renunciation by the Holder.**

At Common Law, mere waiver or mere agreement without satisfaction will not operate to discharge a contract unless the agreement by the one party to release the party liable is under seal. Under the Bills of Exchange Act, however, express renunciation will operate to discharge a bill, for Section 62 of the Act provides that :—

62. (1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

A bill will be discharged in accordance with these provisions if the holder at maturity tells the acceptor that he renounces all claims against him, and gives up the bill to him, or if the holder in writing absolutely renounces his rights against the acceptor. But if renunciation is to operate as a discharge of the bill as a whole, it must be of the rights of the holder *against the acceptor*; renunciation of his rights against any other party will not discharge the bill. For example, A is the payee of a bill, and B, C, and D are subsequent indorsers. If D renounces his rights against the payee, A, the renunciation will operate to discharge A and any indorsers subsequent to A, i.e., B and C, but it will not discharge the drawer and acceptor.

Moreover, the renunciation must be absolute and unconditional, so that if it is made conditional upon the happening of an event, the mere fulfilment of the condition will not make the renunciation absolute. It is essential, too, that there shall be an *express* renunciation and not a mere *intention* to renounce. Thus, in the case of *Re George*, 1890, the holder of a note payable on demand, being in a dying state, expressed a wish to renounce the debt. As the note could not be found, he drew up a memorandum directing the note to be destroyed when found. It was held that the mere intention to renounce was not an absolute renunciation, and consequently that the note was not discharged.

It should be noted, also, that whereas the absolute renunciation by the holder of his rights against the acceptor will effectively discharge the bill against *all* persons, a renunciation of rights against one or more parties will not be effective as against the holder in due course, who has no notice or knowledge of the renunciation.

### Cancellation by the Holder or his Agent.

By virtue of Sub-section 63 (1) of the Act :—

63. (1) Where a bill is intentionally cancelled by the holder or his agent and the cancellation is apparent thereon, the bill is discharged.

The Act does not define what is to be regarded as cancellation for the purpose of this section, so it would appear that any method can be applied providing that there is an unmistakable intention to cancel and discharge the bill. If the bill is not actually destroyed, then cancellation is generally made effective by deleting with a pen the signature of the drawer or acceptors, and, as an additional safeguard, writing the word "Cancelled" across the face of the bill.

Whatever the actual form of cancellation, it will not be effective unless it is apparent on the face of the instrument, so that if a bill has been cancelled but the cancellation is not apparent thereon, the bill will be valid in the hands of a holder for value if he obtains possession of the instrument before maturity.



The above sub-section refers to the discharge of the *whole* bill by cancellation, but Sub-section 63 (2) provides in addition for the discharge of any party to a bill by the intentional cancellation of his signature by the holder or his agent :—

63. (2) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

Cancellation of the signature of a party in accordance with this sub-section will not operate as a discharge of the whole instrument. Thus if A, B, C, and D are successive indorsers of a bill, and the holder E cancels B's indorsement, B, C, and D would be discharged, but A and all prior parties would still be liable.

It must be noted that a cancellation to be operative must be *intentional*, and by Section 63 (3) of the Act it is provided that :—

63. (3) A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

It follows, therefore, that although the apparent cancellation of a signature to a bill is *prima facie* evidence that the cancellation was intentional, evidence may be admitted to prove that the cancellation was unintentional, or made by mistake, or without authority.

### Material Alteration.

The provisions of Section 64 of the Act which have particular reference to the discharge of liability on a bill by material alteration thereof are discussed in Chapters 11 and 12, *ante*.

### Bills of Exchange and the Statute of Limitation.

Apart from the express provisions of the Bills of Exchange Act as to circumstances in which a bill is to be regarded as discharged, it must be remembered that since a bill is merely a simple contract, it falls within the operation of the Statute of Limitation, 1623, so that any action on the instrument is barred after the lapse of six years from the time when the right of action of the person suing first arose, unless (by virtue of the Statute of Frauds (Amendment) Act, 1828) such right is renewed by a written promise to pay, or by an acknowledgment of the existence of the bill signed by the party to be charged or by his authorised agent, or by any payment on account of principal or interest. If the right of action is barred, the holder as a rule has no remedy against any parties to the instrument, who may

therefore be regarded as having been discharged from their liability thereon.

As regards the acceptor, the time begins to run from the due date of the bill, since the right of action on a bill first arises when the bill first becomes due. Where, however, by the terms of the acceptance, the bill *must* be presented to the acceptor for payment, then the time begins to run from the date when the bill was so presented and payment was refused. Similarly, wherever the holder has to perform certain statutory obligations before the right of action is complete, then the date of the accrual of the cause of action depends upon the performance of those duties. Thus as regards the drawer or an indorser, notice of dishonour is essential to the completion of the holder's right of action against them, so that if a bill is dishonoured on presentment the holder must give the drawer and the indorser notice of dishonour before he has a complete right of action. Consequently the time under the Statute of Limitation commences to run from the date on which notice of dishonour is given or despatched by the holder.

In the case of a bill payable on demand, the time begins to run from the date of issue, i.e., the date appearing on the bill. The time in such a case must not be reckoned from the date of demand for payment or from the date of dishonour. It must be noticed also that in the case of a cheque there is no need for the holder to give notice of dishonour to the drawer, although any indorsers must be notified if their liability is to be secured.

### Discharge of a Person in the Position of Surety.

As already indicated, a person sometimes signs a bill of exchange or promissory note merely as a surety for another person or persons. If the holder of a bill knows or gets to know that the relationship of principal and surety thus exists between parties to the bill, he must exercise extreme care in his dealings with such parties. Otherwise, if he enters into an agreement to give time to the principal debtor, or waives his rights against such debtor, the surety or sureties will be freed from liability, unless the holder, in making the arrangement with the principal, expressly reserves his rights against the surety or sureties.

Apart, however, from such special relationship, the drawer and indorsers of a bill are regarded as being in the nature of sureties for the acceptor, and any holder of the bill is presumed to know this. Consequently, if a holder makes any special arrangement with the acceptor such as would in ordinary circumstances of principal and surety discharge the surety or sureties, the drawer and indorsers may be discharged. In the same way, the indorsers of a bill are in the position of being sureties for the drawer, the second indorser in the position of being surety for the first indorser, and so on in order of liability. It follows, therefore, that the holder of a bill who wishes to

retain the liability of all parties thereto should not enter into any arrangement with a prior party which would conflict with the rights of any subsequent party as a surety for due payment of the instrument.

Accordingly, the drawer and any indorsers to a bill will be discharged if the holder, without the knowledge or consent of such parties, makes a binding agreement with the acceptor to give him time within which to pay, or takes from the acceptor a new bill payable at a future time instead of a bill which has matured, or at the express request of the acceptor delays in presenting the bill for payment. Again, if the holder of a bill agrees to give time to the first indorser, this discharges all subsequent indorsers (who are in the position of sureties for the first indorser), but it does not discharge the drawer or acceptor.

But in order that the giving of time or other arrangement shall operate to discharge the surety or sureties, it must be made with the person *who is in fact the principal debtor*. Thus, if a bill is accepted for the accommodation of the drawer, the latter is the principal debtor and the acceptor is merely a surety for him, so that time given to the acceptor will not discharge the drawer, although time given to the drawer will discharge the acceptor. Similarly, if a bill is accepted for the accommodation of the drawer and of an indorser X, and the holder agrees to give X time in which to pay, the acceptor will be discharged, but the drawer will remain liable.

Before an agreement to give time can operate as a discharge, it must be a binding agreement and must be founded on consideration. Thus it will not be sufficient for the surety to show that the holder has delayed in pressing the principal debtor for payment, unless such delay is clearly in contravention of the original arrangement between the parties. But so long as the party sought to be charged can prove the existence of an agreement between the holder and the principal debtor, it does not matter whether he was in fact prejudiced by the arrangement or not.

As already stated, sureties will not be discharged in any circumstances if the holder expressly reserves his rights against them. Thus in one case the holder of a bill for £200 took £100 from the acceptor in full discharge of his claim, but expressly reserved his rights against the drawer and indorsers. Such parties were not discharged.

### Conflict of Laws.

Conflict of laws arises from the fact that the laws of various countries differ in their interpretation of the validity of certain instruments and of the usages and principles applicable thereto. Thus the Courts in this country are sometimes employed to decide the validity of certain instruments and transactions which

have been completed in another country, wherein the laws applicable in the particular circumstances differ from those in this country. In the majority of such cases conflict of laws would arise, for what is valid in this country may not be valid in the other country, or *vice versa*. The Courts must therefore decide whether the rules of the country where the action is brought shall be applied, or whether the transaction must be subject to the rules of law of the country in which it took place.

In connection with bills of exchange, Section 72 of the Act sets out the following rules for the guidance of the Court in the determination of the rights, duties, and liabilities of parties to bills drawn in one country and negotiated, accepted, or payable in another country :—

72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows :

- (1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra protest*, is determined by the law of the place where such contract was made.

Provided that—

- (a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue :
  - (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.
- (2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *supra protest* of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.

- (3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.
- (4) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.
- (5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

It will be seen that Sub-section 72 (1) provides that the law of the *place of issue* determines the validity of a bill as regards its requisites in form. Accordingly, a bill which is valid in form according to its place of issue will also be treated as valid in the English Courts, but a bill which offends the requisites of form

required by the law of the country of issue will, if negotiated here, be treated as invalid by the Courts in this country also.

There are, however, two exceptions to this rule. Section 72 (1 *a*) provides that a bill issued out of the United Kingdom is not invalid by reason only that it does not bear the stamp required in the country of issue. In this connection it must be noted that the Stamp Act, 1891, requires a bill issued abroad to be stamped on coming into this country before it can be dealt with, although the title of a *bona fide* holder is not affected by reason only of the fact that the bill was not stamped before being dealt with when it arrived in this country, provided that it was stamped when negotiated to him:

The second exception is defined in Section 72 (1 *b*), which provides that a bill conforming to the requisites as to form required by the law of the United Kingdom, although it offends those of the country of issue, will be valid in the hands of a holder against all persons who became parties thereto *in the United Kingdom*. But no action can be taken on such a bill against those who were parties to it in the country of issue.

It remains to be noticed that, as regards the requisites as to the form of transactions on the bill *subsequent* to its issue, Sub-section 72 (1) provides that the law of the place where the transaction took place will decide its validity. Thus, if an inland bill is negotiated abroad and a foreign indorsement appears thereon, then unless the indorsement complies with the law of the country where it was affixed, no action can be brought against the indorser in the English Courts, even though the indorsement satisfies the requisites as to form required by the rules of law of the United Kingdom.

**INTERPRETATION.**—Sub-section 72 (2) deals with the validity of the various transactions on a bill which are necessary to its due completion and negotiation, and provides that the law of the country where the transaction was made will be interpreted in order to find the legal effect of such act.

**SUM PAYABLE.**—In the case of bills payable *outside* the United Kingdom, but on which action is brought in the United Kingdom, Sub-section 57 (3) provides that the holder can sue for the amount of re-exchange with interest up to the date of payment.

Where a bill is expressed to be payable in a foreign currency and action is brought thereon, there appears to be some doubt as to whether the rate of exchange to be fixed by the Court should be that ruling when the bill fell due or that ruling on the day judgment is given. In *Cohn v. Boulton*, 1920, it was held that the rate of exchange at which the amount of the judgment is to be calculated is that ruling on the day of the trial, and although this appears to be the reasonable and equitable course, other judgments on the point are conflicting.

**DUE DATE.**—Sub-section 72 (5) is important in the case of bills drawn or payable in countries which have no days of grace.

Thus if action is brought upon a bill drawn in the United Kingdom but payable in Paris, then the fact that no days of grace were allowed by the holder when presenting the bill for payment will not prevent action for dishonour, as no days of grace are allowed in France. But, on the other hand, days of grace must be added in the case of a bill drawn in France and payable in this country, since Section 14 provides for days of grace on *all* bills payable in this country, whether they are drawn at home or abroad.

## CHAPTER 18

### PROMISSORY NOTES AND BANK NOTES

THE modern promissory note had its origin in the documents issued by the early goldsmiths promising to repay money which had been left with them for safe custody. Strictly speaking, these early notes were really in the nature of receipts, but as time went on they gradually assumed the form with which we are familiar to-day, and embodied a promise or undertaking on the part of the issuer to pay on demand a stated sum of money.

For some years the character and precise significance of these early promissory notes were not clearly defined, but by an Act of 1704 it was declared that promissory notes were to be regarded as generally similar to bills of exchange. Thus the law recognised that a promissory note was a negotiable instrument, which could be transferred by delivery so that the *bona fide* holder for value could obtain a good title and be able to sue in his own name. Moreover, as time went on, two distinct classes of promissory note came to be identified, i.e., the notes issued by a banker or banking company, and the promissory notes issued by a private individual or trader. The latter were used like bills of exchange to settle debts and to make loans of money between members of the trading community, but the former, in addition to fulfilling these functions, became recognised also as a useful medium of payment, and gradually took their place as an important part of the currency of the country.

In order to distinguish promissory notes of the second type from their apparently less gilt-edged brethren, the practice arose of referring to them as *bank notes*, but as we have seen in the historical survey in the earlier chapters of this book, the history of bank notes was by no means such as would endow these instruments with an unblemished reputation for due honour. Fortunately, however, the matter was taken in hand by the Legislature, which decided that the issue of these instruments in England should be subject to rigid control and should ultimately become concentrated in the hands of the Bank of England. Gradually the Bank of England Note attained that position which a partial legislature sought to ensure; to-day it is accepted everywhere as being virtually as good as gold, and is recognised as being of unquestioned worth as a means of payment.

With necessary modifications, the provisions of the Bills of Exchange Act relative to bills of exchange apply also to promissory notes, but in addition a number of provisions specially

applicable to the latter instruments are contained in Sections 83 to 89 of the Act.

### Definition of a Promissory Note.

The legal definition of a promissory note is contained in Section 83 of the Act, which reads as follows :—


83. (1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.


(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

The following are specimens of promissory notes which fall within the foregoing definition :—

#### Promissory Note Payable on Demand


	£50	LONDON, 17th September, 19...
	On demand I promise to pay to James Brown or order the sum of fifty pounds for value received.	
	THOMAS ROBINSON.	

#### Promissory Note Payable after Date

	£100	LONDON, 17th September, 19...
	Two months after date I promise to pay to James Brown or order the sum of one hundred pounds for value received.	
	THOMAS ROBINSON.	

In these examples, Thomas Robinson is the *maker* (i.e., the person primarily liable in respect of the promise, and James Brown is the *payee*, who becomes liable on the instrument only if he indorses it to a third person.

#### Promissory Note after Date Payable with Interest

	£100	LONDON, 17th September, 19...
	Three months after date I promise to pay the Northern Bank, Limited, or order, at their North-town Branch, the sum of one hundred pounds with interest thereon at the rate of 5% per annum until payment.	
	THOMAS ROBINSON.	



It will be observed that the definition of a promissory note as contained in Sub-section (1) differs very little from the definition of a bill of exchange as contained in Section 3 of the Act, so that in analysing the exact purport of the various terms in the definition, reference can be made to the analysis of the definition of a bill of exchange in Chapter 11, *ante*.

A document which does not comply with the several points in the definition will not be a valid promissory note. In the first place, the promise must be *unconditional*, so that a note running "Nine years after date I promise to pay C £100 provided X shall not return to England" would be invalid because the promise to pay is subject to a condition. Secondly, the instrument must be payable at a *fixed or determinable future time*, so that a note payable on a contingency is invalid, and the happening of the event does not cure the defect. Thus a promissory note payable "Three months after the death of X" would be quite in order as the time of payment is determinable although uncertain, but a note payable "Three months after the marriage of X" is invalid, for the marriage may never take place.

Thirdly, the note must promise payment of a *sum certain in money*, but by virtue of the application of Section 9 of the Act, the sum is to be regarded as certain although it is payable with interest or by stated instalments or according to an indicated or determinable rate of exchange (see *ante*, page 205). A specimen of a note payable with interest is given above. Sometimes the phrase "with lawful interest" is included instead of a precise indication of the rate to be charged, and in such circumstances the rate of interest will be such as is agreed between the parties, subject to the fact that if a harsh or unconscionable rate is charged, the courts may enforce payment of interest against the debtor only at a reasonable rate. If a note payable on demand does not embody a promise to pay interest, interest cannot legally be enforced against the maker of the note.

But although the several requisites of the definition must be complied with, it is not imperative that a promissory note should be in any one of the recognised forms indicated above, so that a note running "I, Thomas Robinson, promise to pay" will be quite in order if it is written out by the said Thomas Robinson, even though his signature does not appear at the foot of the instrument. Similarly, a note running "I do acknowledge myself to be indebted to A in £100 to be paid on demand for value received" was held to be valid as a promissory note, as the words "to be paid" were construed as embodying a promise to pay.

By virtue of Sub-section 83 (3), a promissory note is perfectly valid even though it recites that the maker has deposited title deeds or negotiable securities with the payee as a collateral security. This provision recognises the common practice of taking a promissory note in conjunction with other securities,

such as mortgages, bills of sale, etc., as an additional safeguard, for although the mortgage, etc., may be perfectly valid and effectual in itself, the existence of a promissory note signed by the debtor affords a more speedy remedy against him in case of default, and will, of course, prove particularly useful if the mortgage or other security should prove to be invalid.

In *Kirkwood v. Carroll*, 1903, a promissory note was held to be valid which contained the following clause: "No time given to, or security from, or compensation entered into with, either party, shall prejudice the rights of the holder to proceed against any other party".

A note payable to the maker's order in accordance with Sub-section 83 (2) would be one running: "On demand I promise to pay myself or order", but, as provided in the sub-section, is not valid unless and until it is indorsed by the maker. If such indorsement is in blank the note becomes payable to bearer, but if the instrument is specially indorsed it becomes payable to order. Similarly, a note made by the maker in favour of himself and another person, or a joint note made by two or more persons in favour of one of their number, is not a valid note until it is indorsed by the payee who is also a maker, the general objection in all such cases being that the same party is both promisor and promisee on the same instrument. On the other hand, a joint and several note signed by two or more persons is valid if payable to one of their number. (See below.)

An *I.O.U.* running, for example, "I.O.U. £20 for value received, Thomas Robinson" is not a promissory note, although it may, of course, constitute a valid promissory note if it also contains a promise to pay.

A *Banker's Deposit Receipt* running, for example, "Received of Thomas Robinson £100 to be accounted for on demand, Northern Bank, Limited, James Brown, Manager" is also not treated as a promissory note.

### Inland and Foreign Promissory Notes.

By virtue of Sub-section 83 (4) :—

83. (4) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

For the purposes of this section the British Islands include the Isle of Man and the Channel Islands, as provided in Section 4 of the Act. Thus, examples of foreign notes would be: (a) a note drawn in London and in the body of the instrument made payable in Paris; (b) a note drawn in Berlin made payable in London; (c) a note drawn in any foreign place but with no place of payment indicated.

Apparently the only distinction between a note drawn in the British Islands and a note drawn abroad but negotiated in this

country is in respect of the stamp duty. All promissory notes drawn in the British Islands must be drawn on paper bearing *ad valorem* impressed bill or note stamps, whereas promissory notes drawn abroad require stamping with adhesive *ad valorem* bill or note stamps, which must be affixed by the first person by whom they are negotiated in this country.

By virtue of the express exception in Sub-section 89 (4), quoted below, a foreign note does not require protest upon dishonour, and in this respect differs from a foreign bill. It may nevertheless be advisable to protest a foreign note on dishonour in order to secure the liability of a foreign party thereto in his own country.

### Illegal Promissory Notes.

A promissory note, including a bank note, for a less amount than £5 payable to bearer on demand is illegal in England, although bank notes for £1 and upwards are legal in Scotland and Ireland, and are issued by most of the banks in those countries. With this exception there is no restriction as to the amount for which a promissory note may be drawn.

A promissory note other than a bank note cannot be reissued, but is absolutely discharged when once paid in due course by or on behalf of the maker. On the other hand, bank notes may be reissued as often as is desired. Bank of England Notes are not ordinarily reissued by the Bank of England, but the notes of Scotch and Irish banks are frequently reissued by the banks liable thereon.

### The Delivery of a Promissory Note.

As in the case of a bill of exchange, a valid delivery of a promissory note in accordance with Section 21 of the Act is necessary to render the maker liable, for by [Section 84 it is provided that :—

84. A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

By virtue of Section 2 of the Act, delivery means a transfer of possession, actual or constructive, from one person to another, and if the maker of a promissory note can prove when sued, that a valid delivery of the instrument was not made by him, he will not be liable in respect of his signature to any holder. (See Chapter 16.)


### Joint and Several Promissory Notes.

Section 85 of the Act runs as follows :—

85. (1) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenor.


(2) Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note.

### Joint Promissory Note

	<p>£200</p> <p>LONDON, 17th September, 19...</p> <p>On demand we promise to pay James Brown or order the sum of two hundred pounds for value received.</p> <p style="text-align: right;">THOMAS ROBINSON. JOHN CHAMBERS.</p>
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Where two parties accept *joint* liability upon an instrument, each is liable for the full amount due, but the holder cannot, of course, recover in all more than the amount due to him. Moreover, the holder possesses *one right of action only*. He may employ this right of action against both parties jointly or against either party individually, but once the right of action has been exercised no further remedy is available. Thus, if in the foregoing example the holder elects to sue Thomas Robinson only, he may recover judgment for £200, but if it should transpire that Thomas Robinson is insolvent and cannot pay, no further action will lie against John Chambers, as the holder has exercised completely the one right of action which he possessed. Consequently, if action has to be taken on a *joint* note, all the makers should be sued together, so that judgment against them all may be obtained.

### Joint and Several Promissory Note

	<p>£100-10-0</p> <p>LONDON, 17th September, 19...</p> <p>Three months after date we jointly and severally promise to pay James Brown or order the sum of one hundred pounds, ten shillings, with lawful interest thereon.</p> <p style="text-align: right;">THOMAS ROBINSON. JOHN CHAMBERS.</p>
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Where, on the other hand, two parties accept *joint and several* liability the holder possesses as many rights of action as there are parties, and judgment obtained against one party will not prevent him from suing the other subsequently. Thus, the makers of a *joint and several* note may be sued either singly or together for the whole amount, and although payment to the holder by one of the makers will discharge the note, the fact that judgment is obtained against one does not prevent action being taken against any remaining maker if the judgment is not satisfied.

Moreover, if one of the makers of a joint promissory note or of a joint and several note is compelled to pay, he may maintain an action against his co-maker or co-makers for a proportionate

contribution, and, if one maker of a joint or joint and several note is sued, he may insist upon his co-maker or co-makers being introduced as a co-defendant or co-defendants in the action.

A partner has no authority to bind his co-partners severally, but if he signs a joint and several promissory note in the name of his firm, he will bind the firm jointly and himself severally, i.e., the holder may obtain full payment from the partner himself or from the firm.

A joint and several promissory note differs from a bill of exchange accepted by two or more drawees, in the fact that the parties primarily liable on the note (i.e., the joint makers), are jointly *and severally* liable, whereas the joint acceptors of a bill of exchange (i.e., the parties primarily liable) are only liable jointly and cannot in any circumstances be liable severally. On the other hand, a promissory note cannot have two makers who are liable in the alternative nor can it have two or more makers who are liable severally, and not jointly and severally. Thus a note, signed by two makers, and running "On demand one of us promises to pay", would be invalid.

If a note signed by two or more persons is to be regarded as a joint and several note, it must be drawn either in the form provided for in Sub-section 85 (2), i.e., "I promise to pay" followed by two or more signatures, or it must run "We *jointly and severally* promise to pay", followed by the signatures of the parties. Sir M. D. Chalmers suggests that a note running "I, John Brown, promise to pay", which is signed by John Brown and another person Smith, is to be regarded as the note of John Brown only, but although Smith would not be liable as a co-maker, he would presumably be liable as an indorser under Section 56 of the Act.

### The Doctrine of Principal and Surety Applied to Promissory Notes.

Difficulties sometimes arise in connection with joint and several notes when one party signs as a *surety* for the other and not as a principal equally liable. This frequently occurs in the case of banks, who advance money to a customer against a joint and several promissory note signed by him and one or more persons who are regarded as sureties for the due payment of the instrument by the customer accommodated. In such cases, each of the signers is *prima facie* liable to pay the full amount of the instrument at maturity if it is payable after date, or when the banker demands repayment, if the instrument is payable on demand. Thus at law each person signing is regarded as a principal liable for the due payment of the instrument, and until comparatively recent years it was generally considered that, if the person who signed as surety was sued in respect of

the note, evidence was inadmissible to show that such a person was merely a surety and not a principal. In such cases the general rule of law was held to apply that parol evidence is inadmissible to vary or explain a written contract. Now, however, by virtue of the principles of equity, a person who signs a promissory note as a surety is entitled to prove that the creditor was cognizant of the fact that he was a surety and not a principal, and in certain circumstances he may avoid liability.

The importance of this recognition by law that evidence is admissible to show that the parties to a joint and several note are in the position of principal and surety and not of joint principals, lies in the fact that the creditor, in such circumstances, must treat the parties in accordance with that relationship and not as joint and several debtors equally liable for the due payment of the instrument. Thus the ordinary rules relative to suretyship and guarantees will generally apply, so that any special arrangement made with the principal debtor for payment without the surety's knowledge, or any time given to the debtor by the holder of the note, will operate as a discharge of the surety. Thus, in one case, a joint and several promissory note was signed by A and B, B being merely a surety for A. The holder X arranged, without B's knowledge, to give A, the principal debtor, extra time in which to pay the note, and it was held that B was discharged in respect of his liability on the instrument. Again, a promissory note made by a joint-stock company was indorsed by three directors in succession as a guarantee of the company's obligation on the instrument. It was held that the three directors were equally liable *inter se* as co-sureties, and that they were not liable to one another in succession in the order of their indorsements as is the case in respect of indorsements on a bill of exchange.

### Advances on Promissory Notes.

When an advance is given by a banker on a promissory note it is usual to take a note payable on demand, or at a fixed period after date, and signed by the borrower and one or more sureties. If the note is payable on demand it will be perfectly valid until the expiration of six years from its date, but thereafter action on the instrument will be barred by the Statute of Limitation unless, before the expiration of the period, there is an acknowledgment of the debt in writing, or a payment of interest or part payment of the principal. Accordingly, a banker who thus grants a long period loan against a note payable on demand, should arrange for a new note to be drawn and signed before the expiration of six years from the date of the original note, otherwise he will be unable to sue the makers. In the case of a note payable after date, the usual procedure, if the loan is not repaid when the note falls due, is to obtain the signatures of the

borrower and sureties to a new note for a further period, the discount on the amount of the instrument and the banker's commission being debited to the borrower's account or paid by him in cash.

✓ It sometimes happens in such cases that a person who has signed as surety refuses to renew or cannot renew because of death, bankruptcy or insanity. In such circumstances the banker will either rely on the remaining surety or sureties, or require the debtor to arrange for a new surety, but in no circumstances should the old promissory note be cancelled or destroyed until the banker is satisfied regarding the worth of the signatories to the new instrument. This precaution is necessary so that the banker can hold liable those who have signed the old promissory note if it should happen that satisfactory sureties cannot be obtained for the renewal.

### **Promissory Note Taken as Security for a Current Account.**

Sometimes an overdraft on current account is secured by a promissory note signed by a third person alone, or by a third person jointly with the customer to whom the loan is granted. Usually, such a note will be made payable to the bank, but if it is drawn in favour of the customer whose account is secured, his indorsement should be obtained before the instrument is accepted. Moreover, as a promissory note payable after date cannot legally be regarded as a continuing security for a current account, the banker should safeguard himself in all such cases by taking a memorandum of deposit signed by the customer and the surety, and setting forth the fact that the note is deposited with the banker as security for any sum or sums which shall from time to time be due or become due from a customer obtaining the advance, whether that advance is obtained by the customer alone or jointly with other persons, whether it is obtained on current account or otherwise, and whether the bank may have taken or may thereafter take any further security for the due payment of the debt.

Such a memorandum taken with a promissory note payable after date will, of course, require renewal when the note is renewed, but if the promissory note is payable on demand, the memorandum will serve for a period not exceeding six years. Of course, any payment of interest or part payment of the principal in respect of a promissory note on demand will serve to prevent the operation of the Statute of Limitation as against the principal borrower, but presumably this would not apply to a surety unless he had signed the note or a separate slip as evidence of his knowledge of the payment of interest or part principal.

## Promissory Notes Payable on Demand.

In regard to promissory notes payable on demand, Section 86 of the Act provides as follows :—

86. (1) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

(3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

By virtue of Section 10 a promissory note is payable on demand when it is payable on demand, or at sight, or on presentation, or in which no time for payment is expressed. As to what is a reasonable time in the case of a promissory note is a different matter from a reasonable time in the case of a cheque or bill on demand. As has been observed, promissory notes are frequently taken as cover for an advance, and in estimating reasonable time the character of the instrument as a continuing security must be taken into account. Thus, although twelve days has been held to be an unreasonable time before negotiation in the case of a cheque (see page 255), it was laid down in one case that ten months was not an unreasonable time before presentation for payment in the case of a promissory note on demand which was held as a continuing security.

Sub-section 86 (3) prevents the application to promissory notes payable on demand of Section 36 (3) of the Bills of Exchange Act and thus recognises the fact that such instruments are frequently taken as a continuing security, whereas cheques and bills payable on demand are not so taken but are used primarily as media of payment.

## Presentment of Promissory Notes for Payment.

A promissory note does not, of course, require acceptance, for the signature of the party primarily liable (i.e., the maker) appears thereon before issue. The rules regarding the presentment of promissory notes for payment are thus set forth in Section 87 of the Act :—

87. (1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

(Refer to Section 52.)

(2) Presentment for payment is necessary in order to render the indorser of a note liable.

(Compare Sections 45 and 46.)

(3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser



liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

An example of a note which in the body of it is made payable at a particular place is given on page 460, *ante*. If such a note on maturity was in the hands of a holder other than the bank, and was not presented for payment at the branch indicated, the maker would be discharged. It must be observed, however, that the mention of the place of payment must be in the body of the note if it is to affect the liabilities of the parties, so that a note bearing the words "Payable at the Northern Bank, Northtown", under the maker's signature, need not be presented at the place indicated in order to render the maker liable, although presentment at that place will be sufficient to render the indorser liable.

In other respects the rules governing presentment for payment contained in Section 45 of the Act, and also the circumstances in which presentment for payment is excused as set forth in Section 46 of the Act, apply to promissory notes. (See Chapter 16.)

### The Liability of the Maker of a Promissory Note.

The maker of a promissory note is the principal debtor or the party primarily liable on the instrument, and in this respect he differs from the drawer or maker of a bill of exchange. Generally speaking, the liabilities of the maker of a promissory note correspond with those of the *acceptor* of a bill of exchange, the liability and obligations of both being governed by similar rules.

The liability of the maker of a note is thus laid down in Section 88 of the Act:—

88. The maker of a promissory note by making it—

- (1) Engages that he will pay it according to its tenor;
- (2) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

(Compare Sections 52 and 57.)

Certain of the distinctions between the maker of a note and the acceptor of a bill have already been mentioned, but it may be reiterated that whereas the maker of a note originates the instrument and is the party primarily liable, the drawee of a bill is not liable as acceptor until he signs, and if he does not sign the drawer is the party ultimately liable. Moreover, it will be remembered that (a) while a note cannot be made conditionally, a bill may be accepted conditionally; (b) the maker and payee of a note are immediate parties in direct relationship with each other, whereas the acceptor and payee of a bill have no direct relationship unless the bill is payable to the drawer's order; (c) whereas the maker of a note will be discharged unless the note is presented for payment at the place mentioned in the

body of the instrument, the acceptor of a bill is not discharged by the omission to present at the place of payment, unless it is expressly stipulated that he will be so discharged unless the bill is presented for payment at the place indicated. [Cf. Section 52 (2).]

In the event of non-payment of a note, the measure of damages recoverable from the maker will be determined as provided by Section 57 of the Act in reference to Bills of Exchange. (See Chapter 17.)

### Application to Promissory Notes of the Law Relating to Bills.

In this connection, Section 89 of the Act provides as follows :—

89. (1) Subject to the provisions in this part and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

(3) The following provisions as to bills do not apply to notes ; namely, provisions relating to—

- (a) Presentment for acceptance ;
- (b) Acceptance ;
- (c) Acceptance supra protest ;
- (d) Bills in a set.

(4) Where a foreign note is dishonoured, protest thereof is unnecessary.

Several results of the provisions of this section have been referred to in the foregoing paragraphs. In addition, it should be noted that all promissory notes other than those on demand are subject to days of grace, unless the words "Pay without grace" are included, or the note is drawn payable on a certain date *fixed*, e.g., "I promise to pay John Brown or order the sum of ten pounds on 1st June next, *fixed*". Also, if a note is payable by stated instalments, days of grace apply to each instalment. The rules governing the liabilities of indorsers and regarding the conflict of laws apply to promissory notes as in the case of bills of exchange. As a promissory note is not accepted, the period of a note payable after sight is deemed to begin to run from the date on which the instrument is first exhibited to the maker.

### Stamp Duties on Promissory Notes.

This matter is dealt with in Chapter 26, but it may here be emphasised that the stamp duty on promissory notes, whether they are payable on demand or after date or sight, is always *ad valorem*. In the case of *inland* promissory notes, the stamp must always be impressed, while all *foreign* promissory notes, whether payable on demand or not, must bear adhesive *ad valorem* "foreign bill or note" stamps. The adhesive postage stamp

cannot be used in the case of a foreign promissory note not exceeding £10: the correct stamp is the 2d. foreign bill or note stamp, which must be affixed by the first person negotiating the instrument in this country. Thus an inland promissory note for £100 payable on demand requires a 1s. impressed bill or note stamp, whereas a bill of exchange for £100 payable on demand is properly stamped with an adhesive 2d. postage stamp, or two adhesive penny postage stamps, or a 2d. impressed stamp or a 2d. impressed bill or note stamp.

It should be noted also that the definition of a promissory note for stamping purposes is far wider than the legal definition of a promissory note as given in the Bills of Exchange Act (cf. the definition given above with that in Chapter 26.)

### Bill of Exchange treated as a Promissory Note.

Section 5 (2) of the Bills of Exchange Act provides as follows:—

5. (2) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

The principal result of this section is that if an instrument, which on the face of it appears to be a bill of exchange, can be treated as a promissory note, the holder is freed from his liability so far as the drawer is concerned to prove presentment of the note for payment and to give the drawer notice of dishonour. Cases of this kind most frequently arise when the drawer and drawee of an instrument in the form of a bill are the same person, e.g., when the Manchester branch of a firm draws a bill on the London branch or London Head Office, in which case the holder may treat the instrument as a note drawn by the Manchester branch payable in London, and is therefore not obliged to give notice of dishonour to the Manchester branch if the instrument is not paid at maturity. Similarly, if the directors of a joint-stock company draw a bill in the name of the company and address the order "To the Cashier", the holder may treat the instrument as a note made by the company, and need not therefore give the company notice of dishonour if the instrument is not paid. Again, if Brown draws a bill on a fictitious person, e.g., Robinson Crusoe, the holder may treat the instrument as a promissory note made by Brown, and hold Brown liable as the principal debtor without presenting the instrument for payment or giving Brown notice of dishonour.

Moreover, if an instrument is so ambiguously worded that it is not clear on the face thereof whether it is intended to be a bill of exchange or a promissory note, the holder may at his option treat it as either.

### Material Alteration of a Promissory Note.

Generally speaking, the rules regarding the material alteration of a bill of exchange apply also in the case of a promissory note, but in special reference to promissory notes the following have been held to be material alterations sufficient to avoid the instrument as against a party who has not assented to the alteration: the alteration of a joint note to a joint and several note; the addition of a new maker to a joint and several note; the erasure or cutting-off of the name of a maker from a joint and several note; the alteration of the place of payment or the insertion of a place of payment where no such place was previously included; the alteration of the stamp or date, and the alteration of the number on a bank note. On the other hand, the alteration of the words "Or order" to "Or bearer", or the addition of the words "On demand" on a note in which no time for payment is expressed, have been held to be immaterial alterations insufficient to avoid the instrument as against any parties thereto.

### Lost Notes.

By virtue of Section 69, the maker of a lost promissory note may be compelled to give the holder a duplicate of the same tenor, provided the holder gives a satisfactory indemnity against the claims of all persons who come into possession of the lost instrument. Moreover, Section 70 provides that if such an indemnity is given, the loss of a note cannot be set up in an action by the holder to recover the amount of the instrument against the maker or other parties thereto.

This matter is of special importance in reference to bank notes. If the loser of such notes can give the issuing-banker sufficient particulars of the instruments to identify them, he may claim fresh notes for the same amount on giving a satisfactory indemnity, as provided by Section 69. This is one of the reasons why bankers always maintain a detailed and careful record of all bank notes which pass through their hands, whether they are issued to customers, or received from customers and remitted to the issuing-banker for cancellation.

It must be remembered, however, that as bank notes are payable to bearer, the finder of a bank note has a good title to the instrument against all the world except the loser, and if the finder pays such a note away for value to a person who takes it as a holder in due course, i.e., without notice that it has been lost, that holder has an absolute title to the note and even the original owner cannot reclaim it from him. Moreover, although the finder himself cannot obtain payment of a lost note from the issuing-banker if a stop has been registered against it, a *bona fide* holder to whom the note has been transferred can insist upon payment, and the banker will be compelled to pay if the answers of such a holder to his inquiries are satisfactory.

Payment of a note may be stopped by giving full particulars of the number, etc., of the instrument to the issuing-banker, who will thereafter make careful inquiries as to the title of the holder if the note is presented for payment. But as stated above, if the answers of the holder are satisfactory, the bank will be compelled to pay, and its only duty in such circumstances will be to give the person registering the stop particulars of the circumstances in which the note was paid. The Bank of England makes a charge of 2s. 6d. for registering a stop against any of its notes.

The value of notes which have been partially or wholly destroyed may be claimed from the issuing-bank if satisfactory proof of the destruction and full particulars of the notes are given in the case of total destruction, or if the partially destroyed notes are returned to the issuers. The issuers will, however, require a satisfactory indemnity from the claimant so that they will be adequately protected in the event of any claims being subsequently made.

## CHAPTER 19

### OTHER INSTRUMENTS RELATING BANKER AND CUSTOMER

In the following paragraphs consideration is given to a number of important instruments with which a banker has to deal in the course of his business either as a banker or as an agent for his customers. Some of these instruments have been previously referred to, but it is now proposed to summarise the most important points relative to their treatment in practice.

#### Conditional Orders to Pay.

Bankers are frequently called upon to honour documents issued by their customers embodying orders to pay which do not conform to the legal requirements that a cheque must be an *unconditional* order in writing, by reason of the fact that the order to the banker requires the fulfilment of a condition before payment can be made. Instruments of this kind are frequently issued by railway companies and local authorities, and, as a rule, are worded somewhat as follows :—

---

To THE NORTHERN BANK, LTD.  
PAY *Thomas Robinson* OR ORDER, the sum of  
*Twenty-five pounds, ten shillings.*  
Provided the receipt below is duly signed, stamped, and dated.  
£25 10 0 For The Northern Railway Co., Ltd.,  
James Brown,  
General Manager.

---

*Received of THE NORTHERN RAILWAY CO., LTD., the sum of.....*

.....

£ : :



Date.....

---

It is clear that an instrument in this form imposes a duty upon the paying banker to see that the direction is obeyed before payment is made, and accordingly the insertion of such a

condition precedent to payment makes the document a conditional order, and, therefore, not a cheque within the meaning of the Bills of Exchange Act. Moreover, it is doubtful whether such an instrument can strictly be regarded as being payable upon demand, for payment cannot be demanded unless the receipt is properly discharged in the manner indicated. A document of this kind does not, in fact, possess the essential characteristics of a negotiable instrument, for even if it is made payable to order or to bearer, it cannot be regarded as being negotiable or even transferable. Apart from the fact that the range of negotiable instruments is strictly limited by law or by custom, a document of the kind here discussed cannot rationally be transferable because, as Sir John Paget has pointed out, it is incongruous that a banker should pay to a person other than the payee money which had already been acknowledged by the payee to have been received by him.

It is not, however, always easy to determine whether stipulations of this kind on the face of a cheque are such as to make the order conditional. For example, documents are sometimes issued by customers which are precisely similar in form to an ordinary cheque, but bear on the face a note to the effect that an attached receipt must be signed before the instrument is presented for payment, or merely such words as "The receipt at back hereof must be signed, stamped, and dated". The position of the paying banker in such a case is a difficult one, for although the direction is clearly addressed to the payee, it is nevertheless calculated to catch the eye of the paying cashier, and could be disregarded by him only at the risk that the customer might contend that his instructions had not been fully obeyed. Even if a receipt form is merely attached to or stamped on the back of a cheque, and no direction is given that the receipt is to be signed before presentment, the paying banker would run considerable risk in ignoring the existence of the receipt, for while there may be nothing in the order to pay which could be regarded as making it conditional, a duty would undoubtedly be imposed on the paying banker to see that his customer's wishes were fulfilled so far as is reasonably possible.

Similar difficulties arise in connection with dividend warrants which bear a statement at the foot to the effect that they will not be paid after the lapse of three months (or other period) from the date of issue, unless they are specially indorsed or initialled by the secretary of the issuing body. In *Thairwall v. Great Northern Railway*, 1910, it was held that such a statement was addressed to the payee or holder and did not impose a condition on the drawee-banker sufficient to make the document not a cheque, although the Judge expressed considerable doubt on the point.

In practice, paying bankers insist upon complete discharges to such instruments before they will honour them upon pre-

sentment, but difficulty sometimes arises in obtaining a receipt stamp from the payee or holder, particularly where a receipt has already been sent to the drawer in respect of the amount. It must be remembered, however, that the banker's duty is to his customer, and there is no duty in connection with such a cheque as between banker and the payee or holder. Accordingly, the banker incurs no liability by insisting upon the completion of such a document in accordance with the customer's instructions. If these instruments are made payable to order, the indorsement of the payee will usually be required in addition to his signature to the receipt, whether that receipt appears on the back or on the face of the instrument.

### Protection of Bankers in respect of Conditional Orders.

If the direction inserted in documents of the type here discussed is such as to make the order to pay conditional, the general effect will be to deprive both the collecting and paying bankers of any protection afforded to them by the Bills of Exchange Act, 1882, in respect of documents which are strictly cheques. In the case of an open or uncrossed conditional order, neither the collecting nor paying banker obtains any protection as against the true owner, if the payee's signature or an indorsement is forged or if the holder has no title or a defective title to the instrument. Section 60 of the Bills of Exchange Act will not protect the paying banker against a forged indorsement because it applies to cheques only, while Section 19 of the Stamp Act, 1853, affords no protection because it refers only to drafts or orders drawn on a banker and *payable to order on demand*, whereas, as already pointed out, a conditional order is not strictly a negotiable instrument and is not properly payable to order on demand.

If a document of this kind is crossed, the collecting and paying bankers *may* be protected by Section 17 of the Revenue Act, 1883, which expressly makes applicable to such documents Sections 76-82 of the Bills of Exchange Act, 1882. The protection afforded by this Section will depend, however, on whether or not the instrument paid or collected bears any evidence of transfer, for the section expressly provides that nothing in the Act of which it forms a part "shall be deemed to render any such document a negotiable instrument". If, therefore, a conditional order is collected for anyone other than the payee, the collecting banker will stand to lose the protection of Section 82 of the Bills of Exchange Act on the grounds of negligence, and, on similar grounds, the paying banker will lose the protection of Section 80 if he pays such a document bearing evidence of transfer. If the form of the signature to the receipt is other than that of the payee, such protection will be lost even though



payment is made strictly in accordance with the crossing on the face of the cheque.

Sometimes instruments are issued in cheque form with a receipt form attached and with an indication that the signature to the receipt will be accepted as an indorsement. Even in such cases it is doubtful whether the paying or collecting banker would obtain any protection, as there would appear to be no justification for treating a signature to a receipt as an indorsement sufficient to give the banker the protection of Sections 60, 80, or 82 of the Bills of Exchange Act, as the case may be.

The general position of bankers in regard to these documents is thus highly unsatisfactory, in spite of the fact that they are frequently met with in practice. Bankers are frequently called upon to collect such documents for reputable customers who are not the payees, and in circumstances which would make it very difficult for them to refuse to do so. Paying bankers, too, cannot refuse to honour documents of this kind if valuable customers insist upon their issue, and accordingly it is desirable that a satisfactory indemnity against any claims of the true owner should be taken from the drawer or drawers in all cases where the banker is called upon to pay such instruments. The following is a form of indemnity which may be used for this purpose :—

#### FORM OF INDEMNITY RE PAYMENT OF CONDITIONAL ORDERS

To THE NORTHERN BANK LIMITED,

In consideration of your allowing us, or persons duly authorised by us, to draw drafts on you with receipts attached in the form annexed, we undertake that you shall have as against us in respect thereof the protection afforded by Section 60 of the Bills of Exchange Act, 1882, and that the signature of the receipt at the foot of such drafts shall have the effect of and operate as an indorsement within the meaning of the same Section.

FOR AND ON BEHALF OF THE NORTHERN RAILWAY COMPANY,

*James Brown, Director.*  
*Henry Thompson, Secretary.*

17th June, 19..

(A Specimen of the relative order is attached hereto.)

As has been previously indicated, conditional orders to pay are frequently issued by local authorities, and in such cases an additional complication arises from the fact that the orders are almost invariably not drawn upon a banker, but upon a treasurer who may or may not be the manager of the branch at which the account of the local authority is kept. There is no protection of any kind against the claims of a true owner if such a document bears a forged indorsement or is paid to a holder having no title or a defective title. The protection of the Bills of Exchange Act is excluded because such a document is not a cheque, while Section 19 of the Stamp Act, 1853, and Section 17 of the Revenue

Act, 1883, do not apply as the documents are not drawn on a banker. The only loophole would seem to be that the paying treasurer may bring himself within the protection afforded by Section 17 of the Revenue Act in respect of crossed conditional orders if he can show that, as between himself and the local authority, he is to be regarded as the banker and not merely as the treasurer. But even here the treasurer's personal liability to the true owner for conversion remains undisturbed, subject to his right to recoup himself by debiting the account of the local authority.

In no circumstances should per procuration signatures be accepted on the receipts or in indorsements to instruments of the kind here referred to, unless such discharges are guaranteed by the collecting bankers.

### Documents in the Form of Receipts.

Bankers are sometimes called upon to pay instruments which have no similarity to a cheque, but are merely drawn up in the form of a receipt for a certain amount which it is intended shall be paid by the banker upon presentation of the receipt duly dated, signed, and, if necessary, stamped. Documents of this kind are sometimes issued by Government Departments, and not infrequently bear an intimation that presentment must be made within a prescribed period after issue. The following is a specimen :—

17th June 19..

To THE NORTHERN BANK, LIMITED

Pay *Thomas Robinson* the sum named below, if this receipt is presented within six months from the date hereof duly stamped, signed, and dated.

FOR AND ON BEHALF OF THE X. Y. COMPANY, LTD.,

*James Brown,*  
Director.

**Received** from the X. Y. Company, Limited, the sum of *ten pounds* as per particulars furnished.

£10 : 0 : 0

2d.
Thomas Robinson.
STAMP

*Note.*—This receipt should be signed by the payee, but a per procuration discharge will be accepted if guaranteed by the payee's bankers. In the case of a corporate body, the receipt must be signed on their behalf by an authorised officer whose position must be stated.

Although a document of this kind is not a cheque, it nevertheless requires to be stamped with the ordinary 2d. cheque stamp if it carries the signature of the drawer and can be regarded as an order for payment. Moreover, a receipt stamp must be affixed and cancelled by the person receiving payment if the amount is £2 or over.

Neither the paying nor collecting banker obtains any protection in respect of such documents as against the claims of the true owner if the signature on the instrument is forged, or if the person receiving payment has no title or a defective title to the document. Apart from this, the paying banker cannot debit his customer with an amount paid against a forged signature to a receipt.

As a rule, the paying banker is furnished with a list of the persons who are to receive payment in respect of such instruments, and it is desirable also that he should obtain from the drawer or drawers a satisfactory indemnity similar to the specimen above, against the claims of any person or persons who may seek to hold the banker liable in respect of a wrongful payment.

### Dividend Warrants.

A *dividend* warrant is an order or authority issued by a company in favour of a registered holder of its stocks or shares, authorising its bankers to pay the amount specified therein to the holder or to his named agent. The amount of the dividend represents the share of the holder in the divisible profits of the company for the period specified by the warrant, the amount paid fluctuating, as a rule, with the measure of success which attends the company's business. On issue by the company concerned, a dividend warrant is usually accompanied by a detachable counterfoil or "dividend top", which gives particulars of the way in which the amount of the dividend is calculated, and specifies the proportion of income tax deducted by the company and paid by it to the Revenue in accordance with law. The counterfoil should be carefully retained by the customer, as it is receivable by the income tax authorities as a voucher evidencing the payment of the amount of income tax specified.

Dividend warrants may be issued in respect of *interim* or *final* dividends. The latter dividends are paid when the annual accounts of the issuing company are made up, whereas the former represent distributions to shareholders on account of anticipated profits. A specimen of a combined interim dividend warrant and the relative counterfoil is shown on the next page.

An *interest* warrant is similar in form to a dividend warrant, but differs from the latter in that it authorises payment of a sum representing a fixed percentage of interest, for the period specified, on registered stock in a company, local authority, or

## WARRANT FOR INTERIM DIVIDEND ON ORDINARY SHARES

## THE SILK MANUFACTURING COMPANY, LIMITED

No. : B 171  
James Brown, Esq.

17 North Road, London.  
31st July, 19..

Herewith I beg to hand you a Warrant for Interim Dividend of 1s. 6d. per share free of Tax, on account of the year ending 31st December, 19.., on the 50 fully paid-up Ordinary Shares of this Company held by you.

This Dividend is equivalent to a gross Dividend of	£4 14 6
Less Income Tax @ 4/1½d. in the £.	0 19 6
Interim Dividend of 1/6d. per Share, free of Tax .	<u>£3 15 0</u>

The Warrant must be signed at foot and passed through a Bank.

*I hereby certify that this Company is assessed to Income Tax in respect of its Profits and Gains, and that the within-named Dividend is a portion of such Profits and Gains, in respect of which Income Tax has been or will be paid to the Revenue.*

THOMAS ROBINSON, Secretary.

This Statement should be retained. The Commissioners of Inland Revenue will receive it as a Voucher on claims for repayment of Income Tax.

## THE SILK MANUFACTURING COMPANY, LIMITED

WARRANT FOR DIVIDEND FOR HALF-YEAR  
ENDED 31st DECEMBER, 19..

No. B 171

17 North Road, London.  
31st July, 19..

## To THE NORTHERN BANK, LIMITED

Pay to the Order of James Brown, Esq., the Sum of  
*three pounds fifteen shillings.*

For the above-named Company,

WILLIAM BENNET, }  
ARNOLD WHITE, } Directors.

£3:15:0

THOMAS ROBINSON, Secretary.



PAYEE'S SIGNATURE - .....

This Draft must be signed by the Payee, and presented within  
three months from date.

government—more usually one of the last two. Thus, dividend warrants are issued by the majority of industrial and commercial organisations in this country, whereas interest warrants are issued by the British Government in payment of the periodical amounts of interest due to holders of Consols, War Loans, Exchequer Bonds, and other registered securities.

Both dividend and interest warrants are usually made payable to a named payee or order, and the discharge of that payee is required in the special space provided for the purpose on the face of the instrument, indorsement not usually being necessary. In practice bankers refuse to pay dividend warrants payable to individuals unless they are discharged by the named payee. As a rule a *per pro.* signature on behalf of an individual or individuals will not be accepted either by the paying banker or by the issuers of the warrant unless, in special circumstances, a form of authority is exhibited to and approved by the latter. Dividend warrants made payable to a limited company or corporation should be discharged by its authorised officials in the manner prescribed, while if the warrant is made payable to a partnership, any one of the partners may sign the firm's name or sign for the firm in the usual way. In this connection, it is to be noted that the authority of an official, partner, or other person to sign and indorse cheques or bills does not necessarily extend to the discharge of dividend or interest warrants, and for this reason a banker should act carefully before accepting signatures on such instruments by delegated authority.

By well-established custom *dividend* warrants made payable to *joint payees* may be discharged by any one of the payees named, who may either sign his own name alone or may sign for himself and the other or others. Such a signature is apparently valid and may be accepted by the paying banker or issuers of the warrant even though the joint payees are actually trustees of the money received. This custom is specifically protected by Section 97 (3) of the Bills of Exchange Act, which provides that :

97. (3) Nothing in this Act or in any repeal effected thereby shall affect :—

(d) the validity of any usage relating to dividend warrants, or the indorsement thereof.

In the case of *interest* warrants, however, the signature of one joint payee is not accepted, the discharge of all payees being usually required before payment.

At the present time, the practice of making dividend warrants payable to the bankers of the holder of the stock or shares is becoming increasingly popular, an authority in the form given on page 480 being signed by the holder and forwarded to the company, or to the bank at which the stock is registered. In such a case the warrant requires the discharge of a signing official at the branch of the bank to which it is payable, and the usual

receipt stamp must be affixed if a receipt is attached and the amount of the warrant is for £2 or over. As a rule, bankers thus receiving warrants for dividend and interest forward the counterfoils or "top-halves" to the customer concerned, who thus obtains advice of the payment to his account.

Dividend or interest warrants must bear the ordinary cheque stamp, with the exception of interest warrants issued by the Government in payment of interest on Consols and other state securities. If a warrant bears a form of receipt, the receipt must be discharged and must bear the usual 2d. receipt stamp if the amount is for £2 or over.

Section 95 of the Bills of Exchange Act provides as follows :

95. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.

By virtue of this section *dividend* warrants, but not *interest* warrants, may thus be effectively crossed in the same way as cheques, provided, of course, that they conform with the general legal requirements of a cheque. This means that if a dividend warrant is crossed it must be paid by the banker on whom it is drawn only to another banker, or to the banker named in the crossing, and if this is done, the paying banker obtains the protection of Section 80 of the Act. The collecting banker also will be protected by Section 82 if he collects dividend warrants for his customers only. But the collecting banker obtains no protection in respect of dividend warrants if he credits their amount to the accounts of his customers *before actually receiving payment*, for although Section 82 applies to instruments of this kind, the *Bills of Exchange (Crossed Cheques) Act, 1906*, applies only to cheques proper, and makes no mention of dividend warrants or other documents which are not cheques.

In the case of *open or uncrossed* dividend warrants the paying banker will obtain the protection of Section 60 only if the document is in strict cheque form, although he may be protected by Section 19 of the Stamp Act, 1853, if there is nothing in the instrument which makes it not payable on demand. The collecting banker as usual obtains no protection if he collects an open or uncrossed dividend warrant in respect of which the holder has no title or a defective title, or on which an indorsement is forged.

Difficult questions sometimes arise in connection with the negotiability of dividend warrants, for while Section 95 extends to such documents the provisions of the crossed cheques sections of the Bills of Exchange Act, it does not recognise them as negotiable instruments, although they are undoubtedly regarded as transferable by mercantile custom so long as there is nothing on the face thereof affecting their negotiability, as, for example, the words "Not Negotiable" forming part of a crossing, or the fact that the instrument is made payable to a named

payee only. Clearly, if such a document is crossed "Not Negotiable" or is by its terms of payment not transferable, then a collecting or paying banker would undoubtedly lose any protection to which he might otherwise be entitled if the instrument was paid to, or collected for, a person other than the named payee. Again, if a dividend warrant contains terms making it conditional or otherwise varying its general effect as a cheque, no protection such as that indicated will be afforded to the collecting or paying banker, for Section 95 is presumably not intended to cover dividend warrants which do not conform with the general legal requirements of a cheque.

It will be observed that Section 95 above does not specifically include *interest* warrants as distinct from dividend warrants, but by virtue of Section 17 of the Revenue Act, 1883, *interest* warrants may be validly crossed provided that they are issued by a customer and drawn on a banker, but here again no protection will be afforded to the paying or collecting banker if the instrument bears any evidence of negotiation.

Moreover, although Sub-section 97 (3 d) expressly saves (i.e., recognises or legalises) any usages relative to dividend warrants, it does not mention *interest* warrants, so that presumably the practice whereby dividend warrants in favour of joint payees are paid on the signature of one payee cannot legally be applied to *interest* warrants. In any event, *per pro.* indorsements on these instruments are not usually accepted.

Finally, it may be noted that although dividend and interest warrants are sometimes made payable to a named payee or bearer, they should in no circumstances be paid without the signature of the payee, for apparently the fact that a space is reserved on the face of such a warrant for the signature of the proprietor overrides the usual effect of making a negotiable instrument payable to a named payee or bearer.

### Coupons and Bonds.

A BOND is a written obligation under seal whereby one person undertakes to pay a specified sum of money to, or to perform a specified contract for, another person. The term is frequently applied to an undertaking or promise given under seal whereby a company, corporation or government promises to pay the bearer or the registered holder a specified sum of money. Bonds to bearer pass by delivery, and are now generally regarded as negotiable instruments whether they are issued by a home, foreign or colonial undertaking. Registered bonds (e.g., Registered Exchequer Bonds) are similar to other registered securities which are transferable by deed of transfer, the property therein being vested in the registered holder for the time being, to whom the interest or dividends are payable as they fall due.

For our present purpose we are concerned with bonds payable

to bearer, the issue of which provides registered companies and governments with a convenient mode of raising funds, freeing the issuers from all trouble involved in recording transfers and issuing certificates, while the fact that the bonds, being made payable to bearer, are regarded by mercantile custom as negotiable securities transferable by delivery makes transfer and sale by the holder an inexpensive and convenient process. As a rule, interest or dividends on the capital represented by bearer bonds is paid by the issue with the bonds of sheets of *coupons*, which are small pieces of paper bearing the number of the relative bond and being numbered (and sometimes dated) consecutively. The coupons embody a warrant for the interest or dividend from time to time payable on the bond, and are cut off at half-yearly or other intervals as they fall due to be presented for payment at the place indicated thereon. Usually, coupons bear on their face an indication of the place at which they are payable, but if this is omitted the place is intimated to holders by advertisement in the financial papers. The following is a specimen of a coupon detached from a debenture bond :—

<b>THE NORTHERN TRADING CO., LTD.</b>	
Debenture No. 97	Interest Coupon No. 18
<p>For Two POUNDS TEN SHILLINGS (less income tax), Half-year's interest due the 1st day of September, 19.., and payable at the NORTHERN BANK, LIMITED, Lombard Street, London, E.C., or at the Registered Office of the Company.</p>	
<p>For THE NORTHERN TRADING Co., LTD.,</p>	
<p>Alfred Johnstone, <i>Secretary.</i></p>	
<p>£2: 10s: 0</p>	

Bonds are frequently deposited with the banker either for safe custody or as a security for an advance, and, unless in the former case the bonds are enclosed in a sealed envelope or receptacle held by the banker on his customer's behalf, it is the duty of the banker regularly and without negligence to cut off the coupons as they fall due in order to present them for payment and obtain the proceeds for the customer's account, giving the latter such advice of the receipt of the proceeds as is usual. If the coupons bear the respective dates upon which they fall due, the banker should experience no difficulty in carrying out his obligation to collect them promptly, for a list of all coupons falling due on certain specified dates is maintained in a *Coupon Diary* or *Register* at each branch, the Diary or Register being periodically inspected by a senior official. Where, however, the coupons are payable by advertisement, they can be presented for payment only when an advertisement calling for presentment



appears in the *Bond-holder's Register* or other financial periodical, in which circumstances it falls upon the banker to maintain a careful search for any intimation regarding payment of the coupons, so that he can take the necessary steps to cut off and present them at the necessary time and place.

As a rule, the amount of interest payable in respect of each coupon is specified on the face thereof, in which case the banker must see that the correct amount is received by him and credited to his customer's account, less the income tax which is always deducted in such cases by the company or bank paying the coupons. If no amount is specified, the banker will usually be unable to verify that the correct proceeds are received, although he should, where possible, exercise reasonable care in such cases in his customer's interests. Sometimes, the amount of each coupon is specified in foreign money, in which case the coupon will either be paid by London agents of the issuers at a fixed or at a prevailing rate of exchange, or the amount will be sold by the banker's foreign department at the prevailing rate of exchange, the proceeds being credited to the customer less income tax, as in the other cases. If the holder of the bond has an option to have the coupons paid either in this country or abroad, his instructions should be taken by the banker as to whether they should be presented for payment in this country or sold at the prevailing rate of exchange, otherwise the holder may be dissatisfied with the proceeds collected by the banker on his behalf.

Apart from the coupons, the bonds themselves will sometimes fall due for payment, or they may be drawn for payment by the issuers in accordance with the terms upon which they were originally issued. Notice of the date of payment of bonds and of the drawing of certain bonds for re-payment is given in the *Bond-holder's Register* and other financial periodicals, which must be regularly searched by a senior official at each branch in order to ascertain whether any bonds held by that branch should be presented, for negligence on the part of the banker in thus presenting for payment bonds lodged with him by the customer may involve him in liability. Bonds which are due for payment should be presented by the banker much in the same way as coupons, advice being given to the customer of the credit of the proceeds to his account.

All bearer bonds held as security by a banker will, of course, be recorded by him in the *Register of Convertible Securities* (see post, page 582), and such bonds, whether held as security or for safe custody, are generally kept continuously under the control of two persons, who hold separate keys of the relative receptacles.

Details of all coupons and bonds sent up by a banker for collection or sale are entered in a special *Coupon Book* kept for the purpose, the coupons or bonds being forwarded to the Head Office or London Agent of the branch about 14 days before pay-

ment is due. Coupons and bonds are listed on special *Coupon Sheets*, each series being sorted into numerical order and placed in specially made envelopes bearing on the outside an indication of the security and value of the coupons enclosed. When the proceeds are received a note of the amount and of the date of the credit to the customer's account is inserted in the columns of the Coupon Book provided for the purpose.

When the coupons attached to a bond are exhausted, a fresh supply may be obtained by the holder on presenting to the issuing company a slip, known as a *talon*, which is also attached to the bond. The following is a specimen of such a slip:—

---

**THE SOUTHERN COMPANY, LIMITED**  
**5% 1st Mortgage Bonds.**

This talon may be exchanged for a new sheet of coupons, when all the coupons below are exhausted, on presentation to the Company at 17 North Street, E.C.2.

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If the bonds are under the banker's charge, he must take steps to present the talon when necessary, and obtain the coupons on the customer's behalf. If a talon is not attached, as is sometimes the case, the bond itself will have to be presented in order that the new coupon sheets may be obtained.

Coupons generally are exempt from stamp duty, but an exception occurs in the case of coupons attached to scrip certificates, which must bear a twopenny impressed stamp.

Coupons falling due on a Sunday or Bank Holiday are payable on the succeeding business day, for, like cheques, they cannot be debited to the paying customer's account until the date on or after which payment is due.

### Postal Orders and Money Orders.

Postal Orders and money orders are instructions issued by the Post Office for the payment of money deposited at one post office and payable at another, and, as is well known, they are frequently used for the payment of small amounts, particularly by persons who have no banking accounts.

POSTAL ORDERS are issued for all amounts differing by sixpence between sixpence and one guinea (except 20s. 6d.), while odd pence may be provided for by the affixing of postage stamps not exceeding 5d. A poundage or tax is payable on all postal orders, varying from 1d. in the case of orders of small value, to 2d. in the case of orders of higher value. If a postal order is not cashed within three months of its issue, a commission equal to the original poundage must be paid, while orders which are not cashed within six months will be paid only after presentment to the Money Order Department, London, with a request that payment shall be made at a specified office. Payment may be refused

of postal orders which have been altered, erased, cut, defaced or mutilated.

On the face of a postal order, a space is provided for the name of the payee and also for the signature of the payee upon receipt of the money. If the name of the office of payment is inserted in a postal order by the sender, payment will be made only at that office.

MONEY ORDERS are always made payable to specified persons at the office of payment, such persons being entitled to receive the money only upon presentment of a duplicate of the order handed to the sender by the office of issue. Payment of a money order may be stopped by the sender, although the Postmaster-General will not hold himself responsible if payment is made by mistake or negligence after receipt by the Post Office of notice of the stop. Payment may also be deferred for any period not exceeding ten days.

Legally, the payment of a money order cannot be demanded after twelve months from the date of issue, but in practice payment is usually made if a satisfactory explanation is given of the delay, subject to a deduction of a surcharge of sixpence.

The poundage on money orders is comparatively high, varying from 4d. for sums not exceeding £3, to 1s. for sums not exceeding £40, which is the maximum for which any one order will be issued.

Both postal orders and money orders are expressly marked at the top "Not Negotiable", and, accordingly, the innocent holder of such an order which has been lost or stolen can obtain no title to the instrument as against the rightful owner. A fair degree of protection against loss may also be obtained by virtue of the fact that postal and money orders may be crossed generally or specially, in which case they will be paid only to a bank or through the bank named in the crossing. In the case of a postal order which is thus crossed, the name and signature of the payee need not be inserted in the spaces provided before payment will be made by the post office.

Bankers are frequently called upon to accept postal and money orders as part of credits paid in by their customers, in which case it falls upon the branch concerned to present the orders for payment at the nearest post office. All orders thus presented are crossed with the banker's branch stamp and are listed on special sheets provided for the purpose by the Post Office. If, in presenting such orders for payment, the banker acts simply and solely as an agent for collection, he is protected as against the claims of the true owner by Section 25 of the *Post Office Act, 1908*. This provides that a banker who collects for a principal a postal order or document purporting to be a postal order, shall not incur liability to *anyone except that principal* by reason only of having received payment of, or having held, or having presented for payment, any such order or document. As a general rule, however, bankers cannot avail themselves of

this protection by reason of the fact that in practice they credit these instruments as cash *before actually receiving payment thereof* in which circumstances a banker will be liable to the true owner in an action for conversion if the customer has no title or a defective title.

Apart from this risk of liability to the true owner, the position of bankers collecting postal and money orders for their customers is subject to a further danger, by reason of the fact that the Post Office reserves the right to return such orders to the presenting bank at any subsequent period if they are for any reason found irregular, also reserving the right to deduct the amount of any orders so returned from any payment which may be due or may thereafter become due to the bank. In *London and Provincial Bank v. Golding*, 1918, a banker was held entitled to debit the amount of any orders so returned to his customer's account, but the banker may, of course, be involved in loss if he cannot recover in this way. The cashing by the Post Office of postal and money orders presented by a banker must therefore be regarded as *provisional* only, and subject to the right of the Post Office to return the orders to the banker's debit if any irregularity is subsequently discovered.

### Cash Orders.

The term "cash order" is applied to an inland draft payable on demand which is drawn by one trader upon another, as, for example, by a wholesale firm upon its retail customers. As such drafts are not payable at a bank, post office or other organised institution, the proceeds have to be specially collected from the drawee, a procedure which sometimes involves considerable difficulty. For this reason, and also from the fact that cash orders are not recognised by any statutory enactment, bankers sometimes refuse to collect them and do their best to discourage their issue. If they are accepted for collection, presentment is usually made through a branch or agent in the centre at which the drawee resides, a special commission for the facility being charged to the customer for whose account the proceeds are collected.

### Bankers' Drafts upon Demand.

A banker's draft upon demand is an order addressed usually by a branch of a bank to its Head Office, instructing the latter to pay a specified sum to a named payee or to his order. Such drafts may, however, be drawn by the Head Office on one of its branches, or by one branch upon another. In any case, the drawer and drawee of such drafts constitute only one entity or legal person, and consequently the instrument is not a cheque or a bill of exchange within the definitions given by the Bills of

Exchange Act, 1882. On the other hand, by virtue of Section 5 (2) of the Act, the holder of such a draft has the option of *treating it* as a bill of exchange or as a promissory note. A banker's draft cannot be made payable *to bearer*, otherwise the issuing banker will render himself liable to a penalty under the Bank Charter Act, 1844.

As bankers' drafts may be regarded as bearing an implied guarantee for due payment embodied in the signature of the banker by whom they are issued, they form a very convenient and safe means of transmitting funds from one person to another, being frequently applied for by customers or other persons who desire to send a remittance which shall be accepted as being as good as cash or bank notes, but which is free from any great risk of loss. A banker's draft has the advantages over a money order that it can be issued for any amount, and that it is a fully negotiable instrument unless transfer is restricted by making it payable to a named person *only*.

Payment of a banker's draft cannot usually be stopped, for the banker is liable on his signature to a holder in due course, but payment will not be made if the paying banker is notified that the instrument bears a forged indorsement, or that it was lost or stolen before being indorsed by the payee.

Bankers usually take instructions for the issue of such drafts on a special form, which may either provide that the amount is to be debited to the customer's account, in which case a 2d. stamp is required, or may be accompanied by the customer's cheque for the necessary sum.

As a banker's draft is not a cheque it cannot be effectively crossed and is not within the protection afforded to bankers by the Bills of Exchange Act, 1882. The banker paying such an instrument bearing a forged indorsement is, therefore, not protected by Section 60 of the Bills of Exchange Act, but he is protected by Section 19 of the Stamp Act, 1853 (see Chapter 14), which refers to "*any draft or order drawn upon a banker for a sum of money payable to order on demand*". As the crossing on a draft on demand is of no legal effect, the paying banker can incur no liability by paying such an instrument in disregard of the crossing, as, for example, by cashing a crossed draft over the counter or by paying its amount to a banker other than the one named in a special crossing. In practice, however, a banker would usually endeavour to abide by the obvious intention of the drawer or holder if such an instrument presented for payment bore a general or special crossing, for he cannot obtain the protection of Section 19 of the Stamp Act unless he acts *reasonably and in good faith*, and unless he sees that the draft *purports* to be correctly indorsed.

Bankers' drafts upon demand take the same stamp duty as cheques, while drafts which are made payable after sight or after date require the same *ad valorem* duties as bills of exchange.

It is to be noted that the term "banker's draft" does not include drafts on demand or after sight or after date drawn by one banker upon another, for such instruments are merely cheques or bills of exchange, and as such are subject to all the usual statutory provisions relative to those instruments. Neither does the term include drafts or orders drawn by one banker in this country in favour of another banker in this country for the settlement of clearing differences or other accounts between the bankers concerned. Documents of the latter kind are described as "bankers' payments", and are exempt from stamp duty.

### English Bank Post Bills.

English bank post bills are bills at seven or sixty days' sight payable to the order of a named payee, issued by the Bank of England and any of its branches for any sum of money between £10 and £1000. The bills are issued free of charge against a deposit of the relative sum, the interest on the amount for the period of the bill being regarded by the Bank as sufficient remuneration for the issue of the instrument. The following is a specimen of such a bill :—

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### BANK OF ENGLAND POST BILL

No. 17963.

LONDON, 1st September, 19..

At sixty days' sight I promise to pay this, my Sole Bill of Exchange, to Thomas Robinson or Order, Two hundred pounds sterling, value received of William Brown.

For the Governors and Company of the Bank of England,

H. MITCHELL,

Chief Cashier.

£200:0:0

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Bank post bills issued by the Bank of England are paid without days of grace, and are sometimes issued with an acceptance written on the face by an official of the bank, although bills which are to be sent into the country are not usually so accepted.

Bank post bills of the kind here considered were first issued in 1738 in response to a suggestion by the Postmaster-General that, by the issue of such bills, senders of funds could avoid the losses which were frequent at that time by reason of the robbery of the mails by highwaymen, the idea being that if the bills were not made payable until seven or sixty days after sight, the losers would have an opportunity of reporting their loss and stopping payment of the instruments. Nowadays, however, the use of such bills is becoming rarer, being confined principally to the

transfer of funds on account of Government departments and services.

### Irish Bank Post Bills.

Bank post bills are also issued by various Irish banks for amounts of £5 and upwards, but they differ from those issued by the Bank of England in that they may be drawn for varying periods after date or sight, and that they take the usual three days' grace. The following is a specimen of an Irish Bank post bill :—

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### BANK POST BILL

(under composition for stamp duty.)

No. 1793.

ROYAL BANK OF IRELAND

£100 : 0 : 0.

DUBLIN, 1st September, 19..

Seven days after sight pay to the order of Thomas Robinson the sum of One hundred pounds sterling.

On account of the ROYAL BANK OF IRELAND,

To THE BANK OF ENGLAND,  
LONDON.

WILLIAM BROWN,  
Manager.

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### Documentary Bills of Exchange.

The term "documentary bill of exchange" is applied to a bill which is accompanied by the documents of title relating to the goods in respect of which the bill is drawn. Such documents may consist of some or all of the following : Bill of Lading, Dock Warrant, Warehouse Warrant, Delivery Order, Policy of Marine Insurance, and duplicate Invoice, each of which will refer to the goods concerned and will usually indicate their value. In some cases there may be a *Certificate of Origin* and/or a *Consular Invoice*. The former is a certificate required by the Customs Regulations of certain countries specifying the place of manufacture or growth of certain articles, while the latter is an invoice made out and declared before the consuls of certain countries to which the goods named in the invoice are being exported.

The general object of the documents is to provide the holder of the bill with the full legal title to the goods concerned in the event of the dishonour of the instrument by non-acceptance or non-payment, and it is accordingly of first importance to the holder that the documents should be valid, correct as to form and complete. Frequently, a banker is expressly or impliedly constituted an agent of a customer to ensure that the documents attached to bills of exchange are in order, and it is, therefore, important that he should be acquainted with the principal re-

quisites, for although he is not responsible for the *genuineness* of the documents, he is nevertheless required to ensure that they *purport* to be what they are intended to be.

Documentary bills come into a banker's hands in one of four ways: (a) for collection on behalf of a customer or correspondent; (b) for acceptance under a documentary letter of credit; (c) for discount on behalf of customers, and (d) for sale or negotiation. In the first case the banker must forward the bill and the relative documents to a branch or agent for collection from the acceptor, taking steps to ensure that the instrument is presented at the right place and at the correct time as prescribed by the Bills of Exchange Act.

*Documentary Bills for Collection.*—As a rule the banker collecting the proceeds of a documentary bill will be instructed to give up the documents on payment at maturity, in which case the instrument is referred to as a "D/P" ("Documents against Payment") bill. These terms sometimes appear on the face of the bill, but as a mere direction to the bank do not have the effect of making it a conditional instrument. In presenting such a bill for payment the banker does not warrant to the acceptor that the accompanying documents are genuine, and he incurs no liability if they should turn out to be forged. On the other hand, the acceptor is entitled to inspect the documents before paying the instrument, but as he should not be permitted to obtain control of the documents before actually making payment, he should be required to inspect them on the bank premises.

*Documentary bills requiring acceptance* may be left with the banker either for his own acceptance under a banker's acceptance credit, or for presentment by him to the drawee for acceptance. In the former case the banker will naturally take the greatest possible care to ensure that the documents are in order before he appends his signature, but even though the documents may prove to be forged, the banker is entitled to debit his customer with the amount of the bill at its maturity if the acceptance was made at the customer's request. If a bill is left with the banker in order that he, as the customer's agent, may present it for acceptance, he must use due care and diligence to see that the instrument is presented to the drawee at the right place and within the correct time, otherwise he will be liable for any loss which may ensue. Furthermore, the banker should see that the acceptance which he obtains is not qualified, otherwise the drawer and other parties to the bill may be discharged from liability thereon in accordance with Section 44 of the Act (see Chapter 16). Thus, he should not take an acceptance which makes payment conditional upon the delivery of the documents of title, or upon delivery of the bills of lading, so that even if such an acceptance is written on the bill by the drawee, the banker should have the bill *noted* for dishonour if he cannot obtain a clean signature,



and he should at once notify the circumstances to the prior parties to the instrument.

If the bill is marked "D/A", i.e., Documents against Acceptance, the banker must transfer the attached documents to the drawee upon obtaining his signature. Here again he does not warrant the genuineness of the documents, but the drawee must be allowed a reasonable time within which to examine them and the bill in order to satisfy himself as to their correctness, completeness and genuineness. In practice, the bill and documents are left with the drawee for about twenty-four hours, i.e., from one business day to the next, after which period they must be collected by the banker if the bill is not accepted and they have not been returned. In this connection, considerable care must be exercised by the banker, for if, by his negligence, an unscrupulous drawee obtains the documents of title without accepting or paying the bill, the customer may be involved in loss which the banker may have to recoup. But the fact that the drawee retains the documents when he has no right to do so will not give him a title to the goods, although he may confer such a title upon an *innocent* transferee to whom he passes the documents in return for value.

If the banker is called upon to present for acceptance a documentary bill which is not marked "D/A", or which is marked "D/P", he should in no circumstances release the documents merely in return for the acceptance of the drawee. On the other hand, the drawee of such a bill may wish to obtain the documents in order that he can claim the relative goods from the shipping company, in which case it is the custom of bankers to release the documents on payment of the amount of the bill less a *rebate* (or allowance of interest for the unexpired period of the bill) at  $1\frac{1}{2}$  per cent. per annum above the current rate for short deposits allowed by the London joint-stock banks. As a bill which is so paid may have some time to run before maturity, it is necessary to provide the acceptor with some protection against its being again circulated, and, accordingly, a receipt for the amount paid is indorsed on the back of the instrument, the receipt specifying the rate of rebate allowed, and the period for which it was calculated.

*Documentary Bills Discounted.*—When documentary bills are discounted by a banker he usually takes from the customer concerned a Memorandum of Deposit or a *Letter of Hypothecation*, in the form described in Chapter 24, by which the grantor is given full ownership of the goods in respect of which the bills are drawn.

It will be observed that the document gives the banker authority to insure and store the goods in his own name, to pay any charges thereon (including freight) to the debit of the grantee, and, in the case of the latter's default, to sell all or any part of the goods to satisfy his claim thereagainst, subject to his right

to proceed against the grantee, if necessary, for any balance outstanding. The documents of title may be released to the consignee only upon his actually handing over the bill, or he may be allowed to handle the documents and also the goods with varying degrees of freedom as the prudence of the accommodating banker or accepting house may dictate. Frequently, and especially when the goods are unsaleable without possession, release of the goods may be granted under a *Trust Receipt*, which is a document signed by the customer acknowledging the documents, admitting the bank's sole property in the goods specified, and undertaking to pay the full proceeds of the sale to the banker upon realisation. The effect of such a document is thus to make the customer a trustee of the relative goods on behalf of the bank, in whose name they must be held, warehoused and sold. Trust Receipts and Letters of Hypothecation require a sixpenny agreement stamp, either impressed or adhesive.

*Documentary Bills for Sale or Negotiation.*—The fourth case is where a banker has to handle documentary bills, usually those which are payable abroad, for sale or negotiation on behalf of his customers, or where he himself purchases such bills from a customer at an agreed rate of exchange. In the former case, the banker is merely an agent, but in the latter circumstances he himself becomes liable as a party to the instruments on transferring them for value. Before sending bills abroad for acceptance or payment, a banker should take steps to see that the relative documents include any necessary certificates of origin or consular invoices which may be required by the custom's regulations of the foreign country concerned.

In examining the documents attached to bills the banker should first of all ascertain that they are complete and properly stamped with the necessary duty. Bills of lading should usually consist of a complete set of three, at least one of which is duly stamped, made out to order, signed on behalf of the shipowner, marked "freight paid", unless a freight receipt is attached thereto, and indorsed in blank, so that the holder may have a *prima facie* title to the goods. If a bill of lading is held as security by a banker it will usually be specially indorsed to him. The banker should also see that any policies of marine insurance received from abroad are properly stamped within ten days of their arrival in this country (see Chapter 26), while the invoice or invoices should be examined to verify the value and description of the goods covered by the bill and referred to in the other documents.

Finally, it may be noted that no right to the goods covered by a bill can be obtained unless the relative documents of title are secured, for even if the bill actually contains a reference to the goods, it confers no lien or title to them in the absence of the documents.

## LETTERS OF CREDIT

A letter of credit is a document issued by a banker authorising his agent or correspondent in another place to honour the drafts of a person named up to a certain amount, and to charge the sum so paid against the grantor of the credit. Alternatively the document may authorise the agent or correspondent to whom it is addressed to draw on demand, or in bills of a specified term, upon the grantor of the credit, the latter undertaking to honour the drafts when they are presented, provided they are in good order and drawn in accordance with the terms of the credit. The credit specifies the period during which it is to remain in force, and contains a request that particulars of all drafts paid or drawn thereunder shall be indorsed in a space provided, so that the letter will at any time indicate how much of the original amount of the credit is still outstanding.

A letter of credit is neither negotiable nor transferable, and payment thereunder can be obtained only by the person in whose favour the document is issued, specimen signatures of that person being embodied in the letter of credit for purposes of identification. Instructions for the issue of a credit are taken from the customer concerned on a special form, the total amount of the credit being at once debited to the customer and credited to a special "Letter of Credit Account", or, if the customer is of sufficient standing, an arrangement being made for the drafts under the credit to be debited to him as and when they are presented for payment.

Letters of credit issued in this country and abroad are variously described according to their terms and the facilities which they place at the disposal of a customer. The more important types are described in the following paragraphs.

**Acceptance Credits** are frequently issued by London bankers and accepting houses, and authorise the grantees to draw upon the issuers within prescribed limits, the issuers undertaking to accept and pay the bills provided they are in proper form and conform with the conditions laid down in the letter of credit. Such a credit may be issued by a London banker in favour of a foreign exporter at the request of a London importer, the arrangement enabling the foreign exporter easily to negotiate bills drawn on a London banker of established reputation, and giving the importer the benefit of that reputation in making his purchases from other countries. By this means the foreign exporter has no fears regarding the due payment of his drafts, while the credit of the importer is reinforced by the established reputation of the issuing bank.

The London banker or accepting house will receive a commission for its services from the importer, who will usually also give a guarantee of security to put the banker in funds when or before

the bills drawn under the credit mature for payment. If the importer accommodated enjoys a first-class reputation financially, the letter of credit may be issued solely on the strength of that reputation and entirely without conditions (as, for example, that the bills drawn thereunder must be accompanied by the relative documents—see below). In such a case, the letter of credit is known as an “open”, “blank”, or “clean” credit, and the bills drawn thereunder are considered and discounted as first-class paper.

**Blank Credits** are extensively used in the financing of international trade, for they are frequently opened by bankers in one country in favour of bankers in another, the latter being thus permitted to draw bills on the country of issue either to meet the requirements of their customers or to take advantage of the opportunities of making profits which so frequently present themselves in international finance.

**Exporters' Credits** are of a somewhat similar character, but are opened in favour of exporters whose financial position and standing are not so clearly recognisable as those of bankers in whose favour blank credits are issued. Exporters' credits enable the persons accommodated to obtain funds some considerable time before their produce or goods are available for export, being issued, for example, in favour of cotton exporters in the Southern States of America who wish to realise upon their produce before it is actually shipped or before the proceeds can be received.

**A Confirmed Credit** is so called because the issuing banker gives the person in whose favour the credit is to operate a direct undertaking to honour the drafts drawn by him under the credit. In other words, the banker *confirms* the promise contained in the letter of credit, which is thereby regarded as irrevocable both by the banker and the customer for whose account it is issued, and can be safely relied upon by the foreign exporter in whose favour it is issued. The bills drawn under the credit may be accepted either by the bank issuing the credit or by the customer in whose favour it is issued, but more usually the former. (See the application form below).

**An Unconfirmed Credit** differs from the type of credit last described in that it involves no *undertaking* on the part of the banker opening the credit that he will accept bills drawn thereunder. Such a credit is in fact nothing more than an intimation to the addressee that, at the time of writing, the issuing banker is prepared to honour bills drawn under the credit providing all conditions as to form, amount and term are complied with. It is, however, possible at any time for the customer opening the credit to cancel it, and if this is done, the issuing banker is under

no obligation to advise the addressee abroad. Such credits are thus of an unsatisfactory nature, for drafts may be drawn thereunder before receipt by the addressee of notice of cancellation, in which case the drafts would not be honoured on presentation to the issuing banker.

In the United States, the terms *Revocable Credit* and *Irrevocable Credit* are used in much the same sense as the terms Confirmed Credit and Unconfirmed Credit adopted in this country. A revocable credit may be withdrawn by the issuing banker or his customer at any time after its issue, whereas an irrevocable credit cannot be withdrawn once its terms are communicated to the beneficiary.

A **Marginal Letter of Credit** is so called because on the margin of the actual bill form to be used a letter is printed giving details of the terms on which the bill is to be drawn and accepted. Usually the letter in the margin will refer to the bill portion of the document in some such words as "We authorise you to draw the annexed bill . . ." It thus forms an integral part of the instrument and must not be detached when the bill is negotiated.

**Revolving Credits or Running Credits** are so called because the amounts for which they are originally made available are automatically renewed from time to time as the bills drawn under the credit are issued or paid. There are three principal types: (a) where the amount of bills outstanding at any time is limited to a certain fixed sum, but fresh bills may be drawn as the others mature and are paid; (b) where the amount drawn for any one draft at any one time is limited to a certain sum, which is, however, automatically renewed when that draft matures and is paid; (c) where a single bill up to a fixed amount may be drawn at any one time, and the credit automatically renews itself for the same amount after each draft.

**Documentary Letters of Credit** are arranged when the accommodating banker agrees to accept drafts drawn upon him, but stipulates that his acceptance will be given only against the security of the documents covering the shipments in respect of which the bills are drawn. Such a credit is issued against a detailed application in the form shown below, duly signed by the customer over a sixpenny agreement stamp. It will be observed that the arrangement provides for delivery with the bills drawn under the credit of the bill of lading, marine insurance policy, invoice, and such other documents as the customer may prescribe. Moreover, the application contains an undertaking by the customer to pay the drafts drawn under the credit and pledges the documents of title to the goods with the banker as security for the due payment of the bills. If necessary, a separate Letter of Hypothecation will also be taken.

APPLICATION FOR A CONFIRMED DOCUMENTARY CREDIT

To

THE NORTHERN BANK LIMITED

Northtown Branch.

\*Strike out mail or cable.

I/We request you to establish for my/our account by <sup>mail</sup> cable a Confirmed

§ Credit on the following terms :—

§ A confirmed or irrevocable credit cannot be cancelled before the date of its expiry without the consent of the accredittees and others.

With your Agents in Philadelphia  
In favour of (Name) James Ambrose & Son  
(Address) 173 East Avenue, Philadelphia

To the extent of £2000, say two thousand pounds, available for drafts at sixty days' sight drawn on The Northern Bank Limited, London, E.C.2, and documents as below covering 130 Bales Cotton in one or more shipments † for invoice cost at fifteen pounds per bale, C.I.F., to be <sup>despatched</sup>/<sub>shipped</sub> from New Orleans to Liverpool direct or indirect and with or without transhipment. Against delivery of the following documents :—

† If any price inserted give unit price if possible and state if terms are F.O.B., C.&F., C.I.F., etc.

(b) If receipts for transportation, etc., are not to be accepted the bracketed Clause must be struck out.

(c) Insert any special documents required.

(d) Insert additional risks or delete if all insurance is being effected here.

‡ Delete this clause if beneficiaries are effecting insurance.

Insert further instructions.

- (a) Invoice.
- (b) Full set of Bills of Lading consigned to Order and blank endorsed. [Unless specifically otherwise instructed you may accept "received for shipment or transportation" Bills of Lading in the form customarily issued at the port or place of loading.]
- (c) .....
- (d) <sup>Marine</sup>/<sub>War</sub> Risk Policies or Certificates covering twenty per cent. above the C.I.F. value.

[‡ Marine and War Insurance will be effected by ..... and I/we undertake to keep the said merchandise adequately covered by Policies of Marine, War, Fire and other usual risks in approved Companies and to lodge with you or produce the policies if called upon to do so, and in the event of my/our failure so to do you may so insure the said merchandise at my/our expense.]

This Credit is to remain irrevocably valid until six months from the date hereof.

In consideration of the opening of the above credit I/we hereby undertake to accept and to pay in due course all drafts drawn within the terms thereof and/or to put you in funds to meet your acceptances and/or to take up and pay for all documents negotiated thereunder on presentation and in default of our so doing you may sell the goods before or after arrival.

You are to have a lien on all goods, documents and proceeds thereof for any obligations or liabilities present or future incurred by you under or arising out of this credit.

The transmission of instructions under the above credit and the forwarding of documents are entirely at my/our risk. You are not to incur any liability beyond seeing that the drafts and documents purport to comply with the terms and conditions of this credit.

You are authorised to debit my/our account with sums paid under this credit, also with commission charges.

Yours faithfully,

Thomas Brown.  
6d.  
STAMP

Date, 7th June, 19..

It will be observed that the application form reproduced is for a *confirmed* documentary credit, i.e., one involving an undertaking by the banker to honour drafts drawn under the credit. A somewhat similar form is used in the case of an unconfirmed credit. The following is a specimen credit which may be issued in response to the above application :—

CONFIRMED DOCUMENTARY LETTER OF CREDIT

THE NORTHERN BANK LIMITED

London, E.C.2,  
7th June, 19..

No. 1793.  
£2000.

To MESSRS JAMES AMBROSE & SON,  
173 EAST AVENUE,  
PHILADELPHIA.

DEAR SIRS,

You are hereby authorised to draw drafts upon this bank at sixty days' sight to the extent in all of £2000, say Two thousand pounds, for invoice cost of goods to be shipped to Thomas Brown, of 25 Quayside, Liverpool.

This credit expires, unless previously cancelled, six months from date. All drafts against it must be drawn and duly advised to us before that date, accompanied by Invoice, Bills of Lading issued to the order of the shipper and endorsed in blank, and Marine Insurance Policies or Certificates covering twenty per cent. above C.I.F. value.

Particulars of all drafts drawn under this Credit must be indorsed on back thereof, and the bills must specify that they are drawn under Credit No. 1793, dated 7th June, 19..

We hereby engage with the drawers, indorsers, and *bona fide* holders of drafts drawn under and in compliance with the terms of this Credit, that against surrender to this Bank of the above-mentioned documents in order, the said drafts shall be duly accepted payable in London, England, on presentation in order; and that they shall be duly honoured on presentation in order at maturity.

We are,

Yours faithfully,

THE NORTHERN BANK LTD.,  
*Henry Robinson,*  
*General Manager.*

Acceptance and documentary credits may be arranged by London bankers and accepting houses not only for the accommodation of our own merchants, but also for the accommodation of foreign merchants trading either with this country or with foreign countries. Thus, a German importer may arrange for the issue of a London banker's acceptance credit in favour of a Brazilian exporter, or an American importer may, through his own bank, arrange for a London banker's acceptance credit in favour of a British exporter. In the latter case, the exporter will draw his bill upon the American importer, and present it with documents attached to the London banker, by whom the draft is accepted and the documents retained for transmission

to the foreign importer. The following is a specimen of such a credit opened from New York in favour of a British exporter:—

IRREVOCABLE DOCUMENTARY CREDIT

GENERAL TRUST COMPANY OF NEW YORK

Foreign Department,  
New York, 1st July, 19..

Letter of Credit No. 17326

MESSRS THOMAS ROBINSON & Co.,  
WHITEWAY HOUSE,  
LONDON, ENGLAND.

GENTLEMEN,

We hereby establish our irrevocable credit in your favour for account of *Messrs Henry White & Co., Inc., New York*, available by your drafts drawn at *Ninety (90) days' sight* on the General Trust Company of New York, 32 Lombard Street, London, E.C., for any sums not exceeding a total of *Twenty Thousand Pounds (£20,000) Sterling*, accompanied by commercial invoice, consular invoice, ocean bills of lading and marine insurance certificates .....

..... evidencing cost, insurance and freight .....

..... shipment of *Two Hundred (200) tons of Rubber from the Far East to New York during August and/or September, 19 .....*

Insurance as above.....

Ocean Bills of Lading must be drawn to the order of General Trust Company of New York.....

A COPY OF THE CONSULAR INVOICE AND ONE BILL OF LADING MUST BE SENT BY THE BANK OR BANKER NEGOTIATING DRAFTS, DIRECT TO THE GENERAL TRUST COMPANY OF NEW YORK, *New York*.

The amount of each draft negotiated, with the date of negotiation, must be endorsed hereon.

All drafts drawn under this Credit should bear the clause "Drawn under G. T. Co. of N.Y. Letter of Credit No. 17326 dated New York, 1st July, 19..

We hereby agree with *bona fide* holders that all drafts drawn by virtue of this Credit, and in accordance with the above stipulated terms shall meet with due honour upon presentation and delivery of documents as specified to the General Trust Company of New York, *London*, if drawn and negotiated on or before *31st October, 19..*

Yours respectfully,

FOR THE GENERAL TRUST COMPANY OF NEW YORK,  
*James Brown,*  
Manager.

Circular Letters of Credit.

These are forms of letters of credit which are issued by bankers for the convenience of persons travelling abroad, either for business purposes or pleasure. A circular letter of credit differs from an ordinary letter of credit only in the fact that, instead of being addressed to one agent or correspondent, it is addressed to the agents and correspondents generally of the issuing banker, the names and addresses of such agents and correspondents being



specified on a *Letter of Indication* which accompanies the circular letter. The following is a specimen of such a credit, together with the relative letter of indication :—

**WORLD-WIDE CIRCULAR LETTER OF CREDIT**

**THE NORTHERN BANK LIMITED**

No. 1695.

£1000

HEAD OFFICE, BISHOPSGATE,  
LONDON, 17th August, 19..

To the Branches and Correspondents of The Bank,

GENTLEMEN,

This Letter of Credit should be presented to you by *Mr James Brown*, to whom you will please furnish such funds as he may require to an amount not exceeding in the aggregate £1000 (say *One thousand Pounds Sterling*) against *His Sight Drafts* upon this Bank, each Draft bearing the clause "Drawn against L/C. No. 1695."

We hereby engage that all such Drafts shall meet due honour if negotiated within a period of *Six Months* from this date.

*All payments made under this Credit must be inscribed on the back hereof*, and this letter itself should be cancelled and attached to the final Draft exhausting the amount.

The holder's signature will be found on the Letter of Indication with which he has been furnished and you are requested to satisfy yourselves by a reference thereto that payment is made to the proper party, the Drafts being signed in your presence.

We are, Gentlemen,

Your obedient Servants,

*The Northern Bank Ltd.*

*William Andrews,*  
Secretary.

*Henry Robinson,*  
General Manager.

[On the Back is printed:]

**SUMS DRAWN UNDER THE WITHIN CREDIT**

Date when paid.	By whom paid.	Name of town.	Amount paid expressed in words.	Amount in figures.		
				£	s.	d.

**THE NORTHERN BANK LIMITED**

**Letter of Indication and List of Correspondents.**

**IMPORTANT**

*It is absolutely imperative that the holder should immediately on receipt of this Letter of Indication and Circular Letter of Credit, affix his or her signature to the Letter of Indication below as a protection against forgery should the Letter of Credit fall into improper hands, and the Letter of Indication should always be kept apart from the Letter of Credit.*

When no longer required the Letter of Indication should be returned to the Bank.

## THE NORTHERN BANK LIMITED

No.  $\frac{W}{W}$  1797.

LONDON, 17th September, 19..

To the Branches and Correspondents of the Bank named in the following pages.

GENTLEMEN,

This book has been issued to *Mr James Brown*, whose signature is given below and who holds our Circular Letter of Credit No. 1695.

Please negotiate drafts on us drawn in accordance with the credit, the drafts to be signed by the above in your presence,

Yours faithfully,

*For The Northern Bank Ltd.,**Henry Robinson,*  
*General Manager.*Specimen Signature of  
*James Brown.*

## TO THE HOLDER

This List and the relative Circular Letter of Credit are issued and accepted on the condition that should the Circular Letter of Credit be presented for payment together with this List by an unauthorised person, the loss, if any, shall fall exclusively on the person to whom the same are issued. See Notes on following page.

[A List of Agents and Correspondents follows.]

It will be observed that the circular letter of credit authorises the bankers to whom it is addressed to pay the person specified such sums as he may require up to a stated limit, and to recoup themselves by drawing on the issuing banker either at sight or otherwise. The letter of indication bears a specimen signature of the grantee and will, of course, be handed by the holder with the circular letter of credit to the banker from whom the money is required. The latter will carefully examine the letter of credit in order to ascertain its terms and will compare the signature of the grantee on his cheque or draft (which must be signed in the paying banker's presence) with the signature given in the letter of indication. Thereafter he will clearly mark each draft drawn with the number of the circular letter, so that the issuing banker will have no difficulty in identifying the credit under which the draft is drawn.

The cashing banker will also indorse particulars of the amount paid by him in the column provided on the back of the circular letter of credit, adding his bank's stamp and signature. If the draft which is cashed exhausts the outstanding amount of the credit, the circular letter should be cancelled by the agent or correspondent concerned, who should return the cancelled document to the issuing banker. A circular letter of credit should always be carefully perused in order to determine whether its period has not expired and whether there is any amount still outstanding, for a banker who advances money against an out-of-date or exhausted letter of credit does so entirely at his own risk that the draft will not be honoured.

As a rule, the circular letter of credit will provide that drafts drawn thereunder shall be negotiated by the cashing banker at

its buying rate of exchange for sight bills on London. Sometimes a small commission will be exacted by the cashing banker for the facility, but usually his profit on the transaction will be included in the rate of exchange.

**Circular Notes.**

These instruments serve a similar object to circular letters of credit, but they consist of actual cheques on the issuing banker for certain round sums in the currency of the country of issue, being handed to the grantee by the issuing banker in exchange for his cheque or cash for the equivalent amount. On the reverse side of the circular note is a letter addressed to the agents and correspondents of the issuing banker specifying the name of the holder and referring to a letter of indication in his hands.

The letter of indication embodies a request to the agents and correspondents to cash the circular notes and to recoup themselves by drawing on the issuing banker at sight. It also contains a specimen signature of the grantee and the numbers of the circular notes issued. This letter must be retained by the holder until all the notes are cashed, but should be surrendered to the banker cashing the last note. The following is a specimen circular note and the accompanying Letter of Indication :—

**CIRCULAR NOTE**

**THE NORTHERN BANK LIMITED**

No. 1793

London, E.C.

17th June, 19..

**CIRCULAR NOTE FOR TEN POUNDS STERLING.**

GENTLEMEN,

This Circular Note should be presented to you by *Mr James Brown*, whose signature appears on our Letter of Indication No. 108, with which he has been furnished. Please pay him or his order the value of Ten pounds sterling at the current rate of exchange.

£10 : 0 : 0.

We are, Gentlemen,

Your obedient Servants,

To the Branches and Correspondents  
of the Bank.

The Northern Bank Limited,  
*Henry Robinson*,  
General Manager.

[On the Back is printed:]

**TO THE NORTHERN BANK LIMITED.**

£10 : 0 : 0

London, E.C.

At sight pay to the order of.....ten pounds  
sterling for value received at the rate of.....

(Holder's Signature) .....

(Date).....

## LETTER OF INDICATION

## THE NORTHERN BANK, LIMITED

London, E.C.,  
17th June, 19..

No. 108

To the Branches and Correspondents of the Bank,  
named in the following pages.

GENTLEMEN,

This Letter of Indication has been issued to *Mr James Brown*, who holds our Circular Notes, numbered 1798-1842, payable at our head office, London.

We request you to purchase any of these notes presented to you for encashment at the current rate of exchange for sight drafts on London, on them being indorsed in your presence in accordance with the specimen signature given below.

Specimen Signature,

*James Brown.*

We are, Gentlemen,

Your obedient Servants,

The Northern Bank Limited,

*Henry Robinson*, General Manager.

IMPORTANT

*It is absolutely imperative that the holder should immediately on receipt of this Letter of Indication and relative Circular Notes, affix his or her signature to the Letter of Indication as a protection against forgery should the Circular Notes fall into improper hands, and the Letter of Indication should always be kept apart from the Circular Notes.*

The Letter of Indication should be retained by the holder until all the Notes have been cashed, when it must be surrendered to the banker cashing the last note.

As a safeguard against loss and fraud the holder of a circular letter of credit or circular notes should, as instructed thereon, always keep them apart from the letter of indication, for neither drafts nor notes will be honoured unless the letter of indication is presented. In the case of loss or theft of circular notes payment thereof should be stopped by circular to the agents or correspondents concerned, a satisfactory indemnity being obtained from the grantee before new notes are issued or before he is given credit for those which are lost or stolen.

A banker who is called upon to cash circular notes should carefully examine the documents and the signature of the grantee, taking precautions similar to those necessary in the case of a circular letter of credit.

**Travellers' Cheques.**

These are documents in cheque form and somewhat similar to circular notes, except that they are not accompanied by a letter of indication. As a rule they are issued for certain round sums, and are signed by the customer when they are handed to him by the issuing bank. On encashment abroad, usually at the

cashing banker's buying rate for sight drafts on the place of issue, they are indorsed by the holder in the presence of the foreign agent, who is thus able to compare the indorsement with the original signature of the person in whose favour the cheques were issued.

The following is a specimen Travellers' Cheque as issued by one of the "Big Five" :—

<b>TRAVELLER'S CHEQUE</b>	
<b>PAYABLE IN ALL COUNTRIES OF THE WORLD</b>	
No. 1794	<i>Payable within Twelve months from (Date) 20th August 19...</i>
<i>Drawer's Endorsement.....</i>	
<i>(To be signed in the presence of the Paying Agent)</i>	
To	<b>THE NORTHERN BANK, LIMITED LONDON, E.C.2</b>
<i>Pay Self or Order</i>	<i>Signature of Drawer</i> } <b>James Brown,</b>
<i>Ten pounds</i>	<i>Witness to Signature of Drawer</i> } <b>William Thompson, Manager</b>
<b>£10</b>	<b>Northtown Branch.</b>
<b>OR THE EQUIVALENT ABROAD AT CURRENT RATES OF EXCHANGE.</b>	

This method of providing funds for persons travelling abroad has practically superseded the older method whereby travellers were furnished with a Traveller's Letter of Credit by virtue of which they were enabled to draw and negotiate drafts on the issuing banker.

### Stamp Duties on Letters of Credit.

Generally speaking, letters of credit are subject to the same *ad valorem* stamp duties as bills of exchange, but those which are granted in the United Kingdom authorising drafts to be drawn out of the United Kingdom payable in the United Kingdom are exempt from such duty. This exemption does not, however, apply to any drafts or circular notes which have ultimately to be paid in this country, for such drafts require stamping as ordinary foreign bills of exchange.

### DEPOSIT RECEIPTS

A deposit receipt is an acknowledgment given by a banker, discount house or other person acknowledging the receipt of money on deposit, and specifying that interest at a stated rate

will be paid on the amount, which is declared to be withdrawable either at call, on demand, or after a specified period of notice. Other receipts specify that the money deposited is left with the bank for a fixed period, although it may be repaid before the expiration of that period subject to a reduction or forfeit of interest.

The deposit receipts issued by bankers and discount houses vary considerably in form, but the following specimens are typical :—

Not transferable.	<p><b>DEPOSIT RECEIPT</b></p> <p><b>THE NORTHERN BANK LIMITED,</b></p> <p style="text-align: right;">NORTHTOWN BRANCH,</p> <p style="text-align: right;">17th September, 19..</p>
	<p>No. 1264</p> <p style="padding-left: 20px;">£100 : 0 : 0</p>
	<p><b>Received</b> from <i>Mr James Brown, 17 East Street, Northtown,</i> the sum of <i>one hundred pounds</i> sterling to be accounted for with interest at the rate of <i>2½ per cent.</i> per annum from the date hereof subject to <i>seven</i> days' notice of withdrawal.</p>
	<p>Entered <i>D.B.</i> <span style="float: right;">For the Northern Bank Limited,</span></p> <p style="text-align: right;"><i>Thomas Robinson,</i> Manager.</p>

This receipt must be produced by the depositor when the deposit or any part thereof is withdrawn, and must be given up on repayment of the amount, which can be paid to no one but the person in whose favour the receipt is granted or his personal representatives.

---

On the back of the instrument is printed :

Received the sum.....in payment of the within-mentioned sum with interest to date at 2½ per cent. per annum.

Signature of Depositor.....

Date.....

Not transferable	<p><b>DEPOSIT RECEIPT</b></p> <p><b>THE NORTHERN BANK LIMITED</b></p> <p style="text-align: right;">NORTHTOWN BRANCH,</p> <p style="text-align: right;">17th September, 19..</p>
	<p>No. 1719.</p>
	<p><b>Received</b> from <i>Mr James Brown, 17 East Street, Northtown,</i> the sum of <i>one hundred pounds</i> as a fixed deposit for <i>six months,</i> bearing interest at the rate of <i>3 per cent.</i> per annum.</p>
	<p>£100 : 0 : 0. <span style="float: right;">per pro. Northern Bank Limited,</span></p> <p style="text-align: right;"><i>Thomas Robinson,</i> Manager.</p>

---

On the back is printed :

Date.....19..

To NORTHERN BANK LIMITED, NORTHTOWN.

Pay.....or bearer the amount of the within-named deposit with interest thereon as stated on the other side.

£..... (Depositor's Signature).....

### The Issue of Deposit Receipts.

The person who holds a deposit receipt on a bank is a customer within the meaning of the definition given on page 105, *ante*, for the instrument is evidence of the existence of a special form of deposit account between the banker and the person concerned. Accordingly, for their own protection, bankers do not issue deposit receipts unless a special application form is completed and signed by the person in whose favour the receipt is required.

As a rule, deposit receipt forms are consecutively numbered and are bound in book form with counterfoils which bear the same number as the corresponding receipt. The receipts are made out by the deposit receipt clerk who compiles the particulars on the receipt form and counterfoil from the application form signed by the customer. Particulars of each receipt drawn out are entered in a *Deposit Receipt Register*, which contains columns for the number of the receipt, the date of issue, particulars of the customer, and for the amount of interest which is calculated as being due at each balance. The details on the receipt and in the Register are carefully checked by a second clerk or the accountant, who initials the receipt and counterfoil and also the entry in the Register before handing the instrument to the manager for signature.

Against the entry in this Register should be noted any special conditions attaching to the deposit or to its repayment, as, for example, whether the amount is subject to any special rate of interest, whether the period of the deposit is fixed or otherwise differs from the usual conditions under which such receipts are issued, and whether in the case of a joint deposit, repayment may be made to one or some of the parties, or whether the signature of all is required for withdrawal. If a mandate is obtained from the depositors, a note of the instructions thereon should be made in the Register. Similarly, such remarks as "Refer to manager before repayment", "Receipt reported as lost", "Receipt said to be destroyed", "Current account overdrawn", "Letter of set-off", and so on, should be made opposite the relative entry.

The Register contains columns for inserting the date of repayment of the receipt and also for the total of principal and interest which is repaid. The names of all depositors are indexed in alphabetical order in the beginning of the Register so that the receipt or receipts standing in any particular name may be turned up without difficulty.

As has been pointed out in Chapter 5, *ante*, the Deposit Receipt Register is periodically balanced, the total of outstanding receipts specified therein being agreed with the balance of the Deposit Receipt Account in the branch General Ledger.

It is clearly of importance that the details on a deposit receipt

should be clearly and neatly written. Any alterations thereon should be carefully initialled by the clerk responsible and the manager, but as a rule it is better in such cases to cancel the altered form and to write out a fresh receipt.

If application is made for the issue of a receipt in joint names, it should be ascertained whether the amount is to be repaid only on the signature of *all* the parties, or against the signature of *any one* of them. In the former case, no special action need be taken, and, in the event of the death of any one of the depositors, the funds automatically vest in the survivor or survivors, unless notice is given by the personal representatives of the deceased that the money is not to be repaid without their concurrence, in which case the banker should act in accordance with the instructions so given. If, however, the depositors wish repayment to be made to any one of their number, a mandate in the form given in Chapter 20 should be signed by all the depositors, and a note of the fact that repayment may be made to any one should be written on the receipt itself and also against the entry in the *Deposit Receipt Register*. It is advisable also to take a mandate of the kind indicated, when money is deposited in the joint names of husband and wife, so that there may be no difficulty in the wife obtaining the money in the event of the prior decease of her husband.

There is apparently no objection to the issue of a deposit receipt in the name of a minor or infant, and if such a receipt is issued, the person concerned can give a valid discharge on repayment of the funds.

There is also no objection to issuing deposit receipts in the names of trustees, executors or administrators, but in practice bankers endeavour to avoid specifying on the face of a receipt that it has any reference to a trust, so that the banker may not be involved in any difficulty if a breach of trust is committed.

### Repayment of Deposit Receipts.

In practice, deposit receipts payable at seven or fourteen days' notice, such as the first example above, are repaid on demand without notice. Deposit receipts repayable at the expiration of a fixed period are issued chiefly by the foreign, colonial and Indian banks, a higher rate of interest being allowed in view of the probability that the funds will not be withdrawn until the expiration of the specified period. A record of all such fixed deposits is maintained by the issuing bank in a special diary kept for the purpose, so that it may maintain an effective control over the flow of its funds. It must be remembered also that when once the period has expired the money becomes repayable upon demand.

As a general rule, the funds represented by a deposit receipt should be repaid only to the person in whose name the receipt is issued, and most forms of receipt bear a notice that the personal



attendance of the depositor is required before repayment can be obtained of the whole or any part of the principal, or of any interest thereon. If, however, the depositor is unable to attend personally, the banker should exercise the greatest care in repaying part or all of the funds. Such repayment should be made only to a person who satisfies the banker as to his right to claim repayment on behalf of the depositor; the receipt should be properly discharged by the depositor, and precautions should be taken, as by comparing the signature with that on the application form, to ensure that the signature is not forged. In addition a separate letter of authority signed by the depositor should be required. If the request for repayment is made by another bank on behalf of the depositor, the latter's written authority should be obtained by the paying banker, or the collecting banker should be required to confirm the discharge of the holder of the receipt.

If a mandate is not obtained in respect of a receipt in joint names, repayment should not be made unless all the parties discharge the instrument or unless one of the parties applying for repayment tenders a written authority signed by all the depositors.

In no circumstances should a deposit receipt issued by one branch of a bank be paid at another branch of the same bank, or at a branch of another bank, unless explicit instructions are received from the issuing branch to the effect that a receipt may be paid. In this connection it will be remembered that if repayment is made against a forged and unauthorised signature the bank handing over the money will be liable for any loss which may ensue. The correct procedure in all such circumstances is to forward the instrument for collection and credit of the proceeds.

Before repayment of any receipt the details thereon should be carefully compared with the entry in the *Deposit Receipt Register*, particularly if the instrument has been outstanding for a considerable period, and in order to ascertain whether there is any special note in the Register relative to the repayment of the receipt.

No repayment of part or all of the amount for which a deposit receipt is drawn should be made unless the instrument is produced, and most receipts now issued by banks have an intimation to this effect printed thereon. On the other hand, the issuing banker cannot refuse to repay the amount of a receipt which has been lost or destroyed, and in such circumstances, repayment should be made against a satisfactory indemnity signed by the person in whose favour the receipt was issued. It may be noted, however, that Sir John Paget points out that "a deposit receipt not being a negotiable instrument, the bank is not entitled to exact an indemnity from the depositor before paying him, if he has lost the receipt".<sup>1</sup>

<sup>1</sup> *Law of Banking*, 3rd Edition, p. 117.

### Stamp on Deposit Receipt.

A deposit receipt issued by a banker does not require a stamp (Chapter 26), but a 2d. receipt stamp is required for the receipt on the back of the form when any amount of £2 or over is withdrawn by the customer. No receipt stamp is required in any case, however, if the amount of the deposit is being transferred, with or without interest, to a new receipt or to a current or deposit account in the name of the same customer, provided the words of receipt are cancelled and some such words as "Transfer to new receipt" or "Transfer to current account" are written above the customer's signature. If the amount is being transferred to the account of a third person, or if interest is being withdrawn by the depositor in cash, then the usual 2d. receipt stamp will be required if the amount is £2 or over. On the other hand, if the discharge on the back of a receipt is in the form of a cheque, as in the second example above, a 2d. cheque stamp will be required for any amount.

A receipt stamp affixed to a deposit receipt must be clearly cancelled either by the banker or by the customer, otherwise they are both liable to a penalty. The customer, i.e., the giver of the receipt, and not the banker, must pay for the stamp.

### Interest on Deposit Receipts.

As a rule only simple interest is paid by bankers in this country on deposit receipts issued by them, for although interest on all outstanding deposit receipts is calculated at each branch at the half-yearly balance, the amount of the interest is not actually credited to the customer unless he makes special application therefor. If such application is made, the depositor should be required to discharge and return the old receipt, the indorsement on the back being completed to show the amount repaid to the customer including principal and interest.

In some banks new receipts are not issued when the depositor withdraws the accrued interest or a proportion of the principal, but an indorsement to the effect is written on the back of the instrument. The better plan, however, and that which is adopted in all the large joint stock banks, is to cancel the old receipt and issue a new one for the remaining balance.

The interest on a deposit receipt is usually paid at a rate which is agreed between the banker and the depositor at the time the deposit is made, but arrangements may be made for interest to be made payable at a rate which varies with either the bank rate or with the deposit rate of London joint stock banks. Sometimes, a banker will agree to pay a relatively high rate on a deposit of a large amount which is left in his hands for a reasonable period of time.

### Deposit Receipt Not Transferable.

It will be noticed that both examples of deposit receipt given above are clearly marked "not transferable." Such documents are not negotiable instruments, and it is generally considered that the title thereto cannot be transferred from the depositor to a third party merely by indorsement so as to enable the latter to demand payment from the issuing banker. It is for this reason that bankers must exercise great caution before paying the amount of a receipt to any one other than the depositor, for if the signature of the holder is forged, or even if it is genuine and payment is made to a wrongful possessor, the paying-banker will be liable to refund the amount to his customer. Thus, in *Wood v. Clydesdale Bank*, 1913, a deposit receipt was paid by the bank to a person who had stolen the instrument, and in giving judgment, Lord Hunter pointed out that the bank was bound to pay only the person named in the instrument, and that the person in possession of an indorsed receipt was not necessarily entitled to receive payment of the document. Accordingly, if a banker is not entirely satisfied as to the right of the holder to receive payment, he should insist upon some proof of identity before paying away the money. Only in very exceptional circumstances would the banker be entitled to debit a receipt bearing a forged or unauthorised signature against the customer, as, for example, where the latter by gross negligence has facilitated the forgery or in some way led the banker to believe that the discharge was genuine. In such circumstances the depositor may be held to be *estopped* from disputing the payment.

It is because of this liability to make good a payment which is wrongfully made that bankers clearly enface their receipts with a notice to the effect that payment will be made only on presentation of the instrument by the depositor in person.

A further result of the fact that a deposit receipt is not transferable is that any banker who collects such an instrument on behalf of any other person than the true owner will be liable to the latter for conversion of his property. A collecting banker has no statutory protection whatsoever in regard to the collection of deposit receipts, and he should therefore refuse to present such instruments for payment unless he has every reason to be satisfied with the title of the presenter. This point is of importance because persons sometimes open accounts at a bank by paying in for collection a deposit receipt drawn upon another bank.

### Assignment of a Deposit Receipt.

Although a deposit receipt is not a negotiable instrument and is not transferable, it is nevertheless a chose in action, or evidence of the existence of a debt which can be *legally* assigned like any other debt or chose in action under the provisions of the Law of Property Act, 1925. By Section 25 of this Act the title

to such a receipt may be assigned in writing by the depositor to a third party provided notice of the assignment is given to the banker by whom the receipt is issued, and provided the assignment is absolute and not merely by way of charge. Accordingly, if the banker receives notice from the assignor or assignee that the amount of a deposit receipt has been properly assigned to the latter, payment of the deposit can be made to the assignee and to no other, and the banker may regard the signature of such assignee as a good discharge for the payment.

It must be noted, however, that in the case of *In re Griffin*, 1899, the mere indorsement of a deposit receipt followed by delivery was held to constitute a good *equitable* assignment, in spite of the fact that the receipt bore in two places the words "This receipt is not transferable".

Again, if the receipt is indorsed with a cheque form on the back (as in the second example above), there is apparently no objection to the bank paying the amount of the instrument to any holder if the cheque form is filled in by the depositor and any requisite period of notice is given to the banker in accordance with the terms of the deposit. Moreover, in the case of *In re Mead*, 1880, it was held that even if the form on the back of such a receipt was filled in for *part* only of the amount of the deposit, it would be valid as a cheque on the banker, requiring payment of the sum mentioned to be made to the person indicated. The banker is not, however, bound to honour cheques drawn against deposit receipts unless he has specially undertaken to do so.

For similar reasons a deposit receipt has been held to be a good subject of a *donatio mortis causâ*, i.e., a gift made by the donor in contemplation of his death and to take effect only in the event of his death.

### Depositor Signing by Mark.

If a deposit receipt is issued to an illiterate person who is unable to sign his name, repayment should be made only if the depositor attends in person at the bank and makes his mark in the presence of one or preferably two independent persons, who should give their signatures, addresses and descriptions in attestation of the mark, in the manner described on page 249, *ante*. If a depositor is ill or otherwise unable to sign his name, repayment should be made only if the document is signed by a mark which is witnessed by two independent witnesses, including, if possible, the depositor's medical attendant.

### The Death of a Depositor.

On the death of a depositor repayment of a deposit receipt should be made to the personal representatives only after the

production of the probate or letters of administration. Particulars of these documents should be recorded by the banker in the usual way in his Register of Probates, and thereafter the funds may be repaid against the discharge to the receipt of the personal representatives of the deceased. On the death of one of two or more joint depositors, the money may be regarded as belonging to the survivors, but in such cases it is always desirable to obtain a mandate when the receipt is issued so as to avoid any difficulty in case the personal representatives of the deceased seek to exercise any rights over the funds.

If a receipt is issued in the joint names of husband and wife, the funds vest in the husband on the death of the wife, but in the event of the death of the husband, the money strictly forms a part of his estate, and in the absence of a mandate should not be transferred to the wife. The funds can properly be dealt with only by the personal representatives after production of probate or letters of administration, but of course, if their authority is obtained, or if the wife is the sole executrix or administratrix, the funds can be transferred to her.

### **Bankruptcy of a Depositor.**

On the bankruptcy of a depositor, any funds standing in his name on deposit receipt belong to the trustee, and should not therefore be repaid by the banker unless the trustee's sanction or his discharge is first obtained. Similar remarks apply in the case of the winding up of a company, in which case repayment should not be made without the sanction or authority of the liquidator.

Presumably a banker who pays out the amount of a deposit receipt to the depositor after the latter has committed an act of bankruptcy and *before the date of the receiving order* without notice of the presentation of a petition in bankruptcy would be protected by Section 46 of the Bankruptcy Act, 1914 (see *ante*, page 322).

### **Deposit Receipts and the Statute of Limitation.**

As a deposit receipt is evidence of the existence of a debt between the banker and his customer, the Statute of Limitation may operate to bar the customer's right to obtain repayment as in the case of any other debt. In the case of a deposit receipt repayable on demand, the time will begin to run from the date on which demand for repayment is made by the customer and refused by the banker, so that such a debt will not be barred unless after such a refusal there has been no part payment of principal or interest during the period of six years. In the case of a deposit receipt repayable after a prescribed period of notice, the time allowed by the Statute will not begin to run until the date of the

expiration of the requisite notice. If the receipt is for a fixed period, as in the second example above, the time begins to run from the expiration of the stated period.

If it is a condition precedent to the right to claim payment that the receipt must be returned to the banker, the Statute will operate only from the date on which the receipt is produced and a demand made for repayment.

The foregoing points are not of any great practical importance at the present time, for no modern banker would take advantage of any rights which he might have under the Statute of Limitation. Nevertheless, it is instructive to remember that a deposit receipt differs from a deposit account in the fact that the periodical crediting of interest by the banker to deposit account effectively bars the operation of the Statute, whereas no such credit is made in the case of deposit receipts, although the interest is periodically calculated for balancing purposes.

### Garnishee Orders and Deposit Receipts.

The conditions on which the funds represented by a deposit receipt may be subject to garnishee proceedings are much the same as the circumstances in which the period of six years prescribed by the Statute of Limitation will begin to run against the customer. Funds on a deposit receipt repayable on demand will be attached by the service of a garnishee order, but if repayment is subject to the giving of notice or to the return of the receipt, the funds will not be attached unless the receipt has been returned or notice has been given by the customer before the order is served. While the judgment in the *Joachimson* case supports the view that the service of a garnishee order is equivalent to a demand for repayment of money held by the banker on a customer's behalf, and therefore operates to attach a deposit receipt payable on demand, it would clearly be inequitable to regard the service of such an order as doing away with the necessity for the return of a deposit receipt if that is a condition precedent to the repayment of the money. On the other hand, money on deposit receipt for a fixed period would be attached by a garnishee order as being a debt which is *accruing due*, but here again the order would not operate to attach the funds if the return of the receipt was an express condition precedent to withdrawal.

### Deposit Receipt as Security.

In view of the decision in *Greenhalgh v. Union Bank of Manchester, Ltd.*, 1924, it would appear that funds on a deposit receipt cannot be set off against any loan or overdraft on current account, unless there is an express or implied agreement between the banker and his customer that such a set off may be exercised,

or until some event occurs to break the account between the banker and the customer and the latter's liability must be determined, as on his death or bankruptcy. In the past, bankers have been accustomed to permit customers to overdraw their current account in reliance upon funds held by the customer upon deposit account or deposit receipt, but presumably the banker would have no right in the absence of an express or implied agreement, to withhold payment of a deposit receipt because the customer has an overdraft upon current account.

If, therefore, there is no arrangement whereby the amount left with a banker on deposit receipt is to be held as a security either in respect of an overdraft granted to the holder of the receipt or to a third party, the banker should definitely safeguard himself by obtaining the customer's indorsement to the instrument together with his signature to a letter of set-off or memorandum of charge. The memorandum should give particulars of the receipt, and should specifically state the purpose for which it is lodged. The following is a form which may be used for this purpose :

#### MEMO. OF CHARGE OVER DEPOSIT RECEIPTS

#### TO THE NORTHERN BANK LIMITED

IN consideration of your agreeing at my request not to require immediate payment of such of the sums mentioned below as may be now due and in consideration of any like sums which you may hereafter advance or permit to become due, I, the undersigned, *James Brown, of 71 East Street, Northtown, Chemist*, herewith send you Deposit Receipt of your Bank, numbered *17914*, for *one hundred pounds* in my favour and I hereby charge the said sum of *one hundred pounds* due to me from your said Bank with the payment of any sum or sums of money which may be now or may hereafter from time to time become due or owing to your Bank anywhere from or by *Thomas Robinson, of 11 North Road, Northtown, Grocer*, his executors or administrators either solely or jointly with any other person or persons in partnership or otherwise upon Banking account or upon any discount or other account or for any other matter or thing whatsoever including the usual Banking charges.

And I authorise you to retain the said sum of *one hundred pounds* and to apply the same or any portion thereof towards payment of any sum or sums as aforesaid.

This is to be a continuing security and in addition and without prejudice to any other securities you may now or hereafter hold and you are to be at liberty without thereby affecting your rights hereunder to vary exchange or release any other securities held or to be held by you.

As Witness my hand this 17th day of June, one thousand nine hundred and.....

Signed by the above-named

*James Brown.*

*James Brown*

in the presence of

(Witness' signature, etc.)

## POWERS OF ATTORNEY

A power of attorney is a document given under seal whereby one person (termed the donor or grantor) gives another person (termed the donee, grantee or attorney) authority or power to act on his behalf either for a certain specified purpose or for all purposes.

The following is a common form of power of attorney :—

## POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that I, *James Brown*, of 17, *East Street, Northtown*, hereby appoint *Thomas Robinson* to be my Attorney in my name and on my behalf to do all or any of the following acts and things to the intent that the powers hereby conferred shall extend to all matters in which I am now or may hereafter become interested :—

(1) To demand, recover, enforce and give good and sufficient receipts, discharges and indemnities for and in respect of all property, money, securities, and rights to which I am or may be entitled, and to effect a compromise or release of any claim in respect thereof and of any claim against me.

(2) To apply and subscribe for (whether absolutely or conditionally), pay calls on, buy, accept or otherwise acquire, and to sell, assign, exchange or otherwise dispose of, stocks, funds, shares, debentures, debenture stock, securities and investments of every description, however constituted and wherever issued, and whether now existing or hereafter to be created, and any options or rights in respect thereof ; to enter into underwriting and sub-underwriting agreements ; and generally to manage and vary investments.

(a) (3) To operate on any banking account, and to open and operate on any new banking account, and to draw, sign and endorse cheques, bills of exchange and dividend and interest warrants.

(4) To buy and sell goods of all kinds, and to effect and maintain insurances on real and personal property, and insurances against loss and liability generally.

(5) To give, vary and revoke instructions as to the manner in which any moneys payable to or by me (whether periodically or otherwise) shall be paid or dealt with.

(6) In connection with any stocks, funds, shares, debentures, debenture stock, securities or investments, to attend and vote or appoint any person to attend and vote as my proxy at meetings of the holders thereof, and to effect, sanction or oppose any exercise or modification of rights.

(7) To exercise by sale, foreclosure or otherwise, any rights now or hereafter vested in or exercisable by me as mortgagee or pledgee of real or personal property.

(8) To institute, carry on, defend, compromise, abandon or submit to judgment in, any legal proceedings, and to join in and submit to arbitration, to give security or indemnities for costs, to pay money into Court, and to obtain payment of money lodged in Court.

(9) To present, support or oppose any petition for winding up or bankruptcy ; to join in, sanction or oppose any composition or arrangement ; to attend and vote or appoint any person to attend and vote as my proxy at any meetings of creditors ; to make and file proofs of claim ; and generally to represent me in any liquidation, bankruptcy or insolvency.

(10) To apply for Probate or Letters of Administration and any similar grants and to obtain or enter into any bond of suretyship in connection therewith.

(11) To concur with any other person or persons having an interest in the doing of any act or thing hereby authorised.

(b) (12)





And for all or any of the above purposes to sign, seal, deliver, execute and do any deeds, transfers, documents, acts and things as effectually as I myself could do if personally present, and to employ and remunerate bankers, brokers, lawyers and agents.

And I hereby declare that these presents shall be irrevocable for *nine* calendar months from the date hereof and shall at all times be conclusively binding in favour of third parties who have not received notice of revocation but so that the exercise by me in person from time to time of any of the powers hereby conferred shall not be deemed to be a revocation.

In witness whereof I have hereunto set my hand and seal this 17<sup>th</sup> day of *September*, one thousand nine hundred and .....

Signed, sealed and delivered  
by the above-named  
  
in the presence of

*Jama Brown.*



*Witness' Signature, Address,  
Occupation or Description.*

**NOTE:** (a) The clause as printed does not authorize the acceptance of bills; if required, insert the word "accept" after the word "sign" and the words "promissory notes" after the words "bills of exchange."

(b) The form as printed does not authorize the attorney to lend money, to borrow money, to pledge securities, to give guarantees, etc. Any such supplementary powers should therefore be inserted in Clause 12. If it authorizes dealings with land or premises, see Section 125 of the Law of Property Act, 1925, as to the necessity for filing the power at the Central Office or the Land Registry.

Such an instrument is commonly used when the grantor is leaving the country for a period of time and wishes to give authority to someone to transact business on his behalf during his absence, and may, of course, relate to all transactions on the customer's account or to dealings with any securities or valuables of a customer in a banker's hands. If a banker is required to accept the authority of a person acting under a power of attorney he should require a certified copy of the instrument to be placed in his hands, and should record any necessary details thereof on the customer's ledger account, in the Register of Securities, Register of Deposit Receipts and in any other places where the information should be available.

If the authority merely empowers the attorney to act in a certain specified manner, as, for example, to draw or indorse cheques, then the authority must not be accepted by the banker for any other purpose, as, for example, for dealing with securities or valuables. Unless the strict letter of authority is complied with, the banker will render himself liable to the customer for any loss which may ensue, and it is for this reason that he should exercise extreme care in investigating the exact purport of the instrument. Moreover, if the power is to continue for a specified period, that period should be carefully noted, and the authority of the attorney should not be accepted after its expiration. Thus, in the case of *Danby v. Coultis*, 1885, a power of attorney was given to operate during the grantor's "absence from England", and it was held by the court that mortgages granted by the attorney after the grantor's return to England were invalid.

The holder of a power of attorney has power not only to sign on behalf of the grantor, but also to execute any documents under seal on behalf of the grantor.

### **Revocation of a Power of Attorney.**

A power of attorney is determined by the expiration of the period for which it is granted, or by cancellation by the grantor, or by the death, insanity or bankruptcy of the grantor. If, however, a power of attorney is expressed to be irrevocable for a fixed time not exceeding one year from the date of the instrument, it cannot be revoked to the prejudice of a purchaser of the property without the consent of the grantee or attorney, nor by the death, lunacy or bankruptcy of the donor, and any act done by the donee in pursuance of the power of attorney will be irrevocable. Moreover, by Section 124 of the Law of Property Act, 1925, it is provided that any person making a payment in good faith in pursuance of the power of attorney (e.g., a banker) shall not be liable because, before the payment was made, the grantor had died or had become lunatic or bankrupt or had revoked the power, provided that such fact is not known to the person making the payment at the time it is made.

### **Signature by a Holder of a Power of Attorney.**

The holder of a power of attorney may, if he so wishes, sign his principal's name without the addition of his own name or any words describing his authority, but, as a rule, the following and more desirable form of signature is adopted :—

“ James Brown, by his attorney Thomas Robinson ”, or  
“ For James Brown, Thomas Robinson, attorney ”.

### **Power of Attorney for Transfer of Registered Stock.**

If the owner of stock registered or inscribed at the Bank of England wishes to transfer it to another person, he must either attend in person at the bank or appoint an attorney to act on his behalf. A form of power of attorney for this purpose is issued by the Bank of England free of charge, and it is frequently necessary for a banker to have such an instrument completed by his customer in favour of officials of the bank so that arrangements may be made for the transfer of the stock without the personal attendance of the customer.

### **Stamp Duty on Powers of Attorney.**

This matter is dealt with in Chapter 26.

## CHAPTER 20

### THE ACCOUNTS OF PERSONAL CUSTOMERS AND PARTNERSHIPS

THE contractual capacity of the various classes of customer with which a banker has to deal and the general procedure involved in the opening and conducting of accounts have already been discussed, but it is now necessary to consider in greater detail the obligations incurred by a banker, and the general rules of conduct which he must strictly observe, in dealing with the various types of customer. As we have seen, the customers of a bank are divided into two important groups, *personal* and *im-personal*, the latter including corporate bodies of all kinds, such as joint-stock companies and local authorities, whose powers are largely defined by law and whose dealings with a banker or with any other person are subject to the powers with which they are invested on formation.

#### The Accounts of Individuals Generally.

Apart from the accounts of the special classes of individual customers which are dealt with in the following paragraphs, the accounts of individuals generally do not call for special precautions on the part of the banker in respect of the contractual powers of persons concerned. It is now definitely established that a banker must obtain satisfactory references before opening a new account and that he may be held liable for negligence unless he takes up references which are given. But provided this is done, and provided the account is conducted in accordance with the arrangements made between the customer and the banker when the account is opened, the banker is not concerned as to the origin of any credits paid in or with the destination of any monies paid out, unless there are any circumstances of a suspicious character or any evidence that the customer's dealings involve a breach of trust of which the banker may reasonably be assumed to have knowledge.

Whether the account is to be maintained in credit or is to be a loan account, the general procedure relative to the opening of accounts will be followed in the manner described in Chapter 10. A specimen of the customer's signature will be taken, and arrangements will be made in regard to the charges to be made by the banker for the conduct of the account, and in regard to the rate of interest which is to be charged or allowed, as the case may be.

If the customer wishes to have his cheques cashed at any other branch or bank, a second specimen of his signature will be taken for dispatch with the necessary authority to the bank or branch concerned.

### Mandates authorising Operations on Accounts.

If the customer wishes to give authority to any person or persons to draw cheques on his account and/or to indorse cheques or bills in his name, the necessary mandate will be taken on the bank's prescribed form, and arrangements will be made for specimen signatures of the person so authorised to be supplied. It is advisable also to arrange for a personal interview with any person thus deputed to sign so that he may thereafter be identified without difficulty by the bank officials. It is very desirable, in the absence of a special request from the customer to the contrary, that a mandate giving authority to sign should be worded so that it may apply to cheques drawn whether the account is in credit or is overdrawn, otherwise difficulties may be experienced in holding the customer liable for any overdraft created by cheques drawn by the agent. Furthermore, it must be remembered that an authority to draw and indorse cheques does not extend to the drawing, accepting, or indorsing of bills of exchange, nor does it imply a power to pledge securities in respect of any advance created on the account.

The mandate should provide that it is to remain in force until revoked by the customer in writing, unless it is desired that there shall be some limit of time or limit of amount in respect of which the authority is to operate, in which cases the limit or limits should be specifically stated in the mandate. A mandate giving a person authority to operate on a current or deposit account does not require stamping.

The following is a typical mandate in use at the offices of one of the "Big Five". It should be carefully noted that William Black is authorised only to indorse cheques, etc., whereas the other agents, James Hardy and Harry Clifford, are given authority to transact any business with the bank.

#### Unlimited Letter of Authority by one or more Persons or a Firm for operation on Account by Third Parties

30th June, 19...

To THE NORTHERN BANK LIMITED.

Until I [we or one of us] shall give you notice in writing to the contrary I [we] authorise *James Hardy* and/or *Harry Clifford* and/or..... whose specimen signatures appear below,

(a) To draw cheques and accept bills in my [our/our firm's] names per-procuration for me [us] or on my [our/our firm's] Banking Account or Accounts and authorise you from time to time to pay and honour all such cheques and bills and place the amount thereof to the debit of the said account or accounts for the time being with your Bank

at *Northtown Branch* whether such account or accounts are in credit, overdrawn or otherwise at the time when such cheques and bills are presented to you for payment.

(b) To draw bills on my [our/our firm's] behalf and to arrange terms with you for the discount of any documents.

(c) To deal with and withdraw any of my [our/our firm's] property and securities from time to time held by you, and to take advances thereon, and to charge to or deposit with you any other securities of mine [ours/our firm's] upon such terms as you may require.

(d) From time to time on my [our/our firm's] behalf to certify the correctness of such account or accounts.

(e) To endorse cheques, bills, notes, drafts, orders and all other documents per-procuration for me [us/our firm] or on my [our/our firm's] account and to pay moneys and such documents to the credit of the said account or accounts and to receive the cheques and other vouchers relating to the said account or accounts.

(f) Generally to act on my [our/our firm's] behalf in all matters of business with you.

Until I [we or any one of us] shall give you notice in writing to the contrary, I [we] hereby also authorise *William Black* and/or..... whose specimen signatures appear below, to endorse cheques, bills, notes, drafts, orders and all other documents per-procuration for me [us] or on my [our/our firm's] account and to pay moneys and such documents to the credit of the said account or accounts and to receive the cheques and other vouchers relating to the said account or accounts.

Signature(s).....  
 .....

NAMES IN FULL.		SPECIMEN OF SIGNATURES.
<i>James Hardy</i>	will sign	<i>J. Hardy.</i>
<i>Harry Clifford</i>	will sign	<i>H. Clifford.</i>
<i>William Black</i>	will sign	<i>Wm. Black.</i>

The words in brackets should be struck out when the mandate is given by one person only, but it will be observed that if the alternative words in brackets are allowed to remain, the mandate may be used for the account of two or more individuals, or for the account of a firm, i.e., a partnership. Any of the clauses which are not applicable may, of course, be struck out, but the alteration should be initialled by the signatory or signatories.

If the authority in favour of a third party is merely to draw cheques, the following simpler form of mandate may be taken :—

**Mandate for a Third Party to Draw Cheques "Per Procuration"**

**To THE NORTHERN BANK LIMITED.**

GENTLEMEN,

I hereby request and authorize you, from time to time, until I shall give you notice to the contrary in writing under my hand, to pay and honour all Cheques which may be drawn by *James Brown* purporting to be drawn by him per procuration for me or on my account, and place the amount of all such Cheques to the debit of my current account for the time being with your Bank at *Northtown*. I having given to the said *James Brown* full power and authority to draw such Cheques on my account, whether such account be in credit, overdrawn or otherwise.

*Thomas Robinson.*

**Seeking and Recording Information concerning Customers.**

It is scarcely necessary to emphasise that in opening a new account, the bank manager or accountant should make it his

business to obtain as much information as possible regarding the customer's financial affairs, so that the necessary assistance or advice may be given if it is required, and so that the banker may be warned in time if the customer's circumstances are not as they should be. Thus, if an individual is known to be living considerably in excess of his income, a reasonable display of forethought and diligence on the part of the bank manager may prevent the bank from incurring loss by reason of having paid cheques on the account after the committal by the customer of an act of bankruptcy or after the making of a Receiving Order against him.

Such diligence is of particular importance in the case of private traders, for by tactful handling and careful investigation, the manager may obtain important information regarding the general state of his customer's business and its prospects of success or failure, which will determine his policy in regard to granting the customer accommodation. If success is foreshadowed, the bank stands to gain an important account and a valuable customer, but if failure is indicated, precautions will be necessary to prevent the bank from being involved in any crash which may ensue.

Wherever possible, the manager should obtain from the trader a statement of his affairs in balance-sheet form, setting forth the nature and value of his liabilities and assets. This matter is of particular importance if an advance is required, and in such circumstances the statement should be renewed as often as seems desirable both for the information of the manager and for the guidance of his head office. The form used by one of the "Big Five" in connection with the accounts of individuals generally and partnerships is shown on the opposite page.

In this connection it is to be remembered that the operations on a customer's account are of first importance as an indication of the state of his business and the nature of his transactions, and possibly in no other way can the cashier or ledger-keeper be of greater service to the bank and of more value to the manager than by bringing to notice any indications of financial weakness, or shortage of capital. Such matters may be indicated, for example, by the customer's acceptance of long-dated bills, by his drawing cheques payable to money lenders, by his payment of instalments on account of trading debts, by his experiencing difficulty in making provision to meet certain cheques, by his transacting business with persons whose cheques are frequently unpaid, and, of course, by the fact that the customer's own cheques have sometimes to be returned unpaid. All information of value relative to a customer's account, business and standing should be recorded from time to time in the *Branch Information Book*, which will also contain records of bills of sale executed by customers as ascertained from Perry's or Stubb's *Gazette*, and also the gist of important interviews between the customer and the manager or accountant.

It may be noted that the successful banker is usually not the manager who is always so careful and unenterprising in his handling of business as never to involve the bank in loss by reason of the failure of weak customers, nor he who aims chiefly at increasing the total of the branch deposits, but the official who by his conduct, courtesy and judgment, is able to afford assist-

**Customer's Statement of Affairs**

Form No. 192.

**NORTHERN BANK LIMITED.**

**NORTHTOWN BRANCH, 17th July, 19..**

*Name of Customer, James Brown.*

*Statement of Affairs as on 30th June, 19..*

Liabilities.				Assets.				
	Previous Bal. Sheet.				Previous Bal. Sheet.			
Creditors (c)	3501	9	3	Debtors (a)	1792	1	0	
Bills Payable (c)	755	10	0	Stock (b)	4560	5	0	
Bank Debts				Premises :—				
Loans from friends, retired or deceased partners, &c.	1750	0	0	Land and Buildings, boilers, motive power, and other fixed machinery, £2750				
Liability on Bills Discounted				Less Mortgage (if any), 500	2250	0	0	
Capital (absolutely belonging to the customer or partners)	3110	0	0	Plant :—				
				Detachable machinery, tools, utensils, &c.	253	5	9	
				Cash in hand	94	9	6	
				Bills Receivable	167	0	0	
£		0116	19	3	£	9116	19	3

*I have examined the Customer on this, and am satisfied it is a fair statement.*

Thomas Robinson,  
Manager.

*I hereby certify that the above is a true statement of my affairs.*

James Brown.

*Attest certified by William Black, A.C.A.*

- (a) When possible, details of the principal items should be given on the back of the form.
- (b) Ascertain: How is stock taken and how checked? Is it valued at cost? Has any part of stock been in hand for any length of time?
- (c) When possible, details of the principal items should be obtained, and also particulars of any security deposited by the customer in respect of the debts.

and when it is required, and who brings the bank handsome profits and an established reputation by promoting the success of customers who show themselves progressive and ambitious.

**Insanity, Bankruptcy, or Death of a Customer.**

On notice of the insanity, bankruptcy or death of a customer the account should be stopped and all cheques thereafter presented should be returned unpaid, with the exception of cheques

which may have been marked by the banker either at the customer's request or for clearing purposes. As a general rule, debits in respect of any liabilities incurred by the banker at the customer's request before receipt of such notice may be charged to the account, as, for example, debits in respect of stocks or shares purchased by the banker on the customer's instructions.

If the customer becomes insane the banker should act in accordance with the principles set out under the heading "Persons of Unsound Mind". On the death of a customer the balance of the account and all rights in connection with the estate of the deceased are vested in his personal representatives, who may be permitted to deal with the customer's balance or with any securities in the banker's hands after (but not *before*) production of the probate or letters of administration. Full particulars of these documents should be registered by the banker in the *Register of Probates and Letters of Administration* (see below), so that they may be available for reference in case of need. Such particulars should include the date of the will (if any), the date of the issue of the probate or letters of administration, the name of the office of issue, the accepted value of the estate as disclosed for probate purposes, and the full names, addresses and occupations of the executors, trustees or administrators.

**REGISTER OF PROBATES OF WILLS AND LETTERS  
OF ADMINISTRATION**

No.	Date of Registration.	Reference to Account.	Granted at	Date.	NAME, ADDRESS AND DESCRIPTION OF DECEASED.
1	17th Sept. 19..	D.A. No. 1793 C.A., p. 191 A-O Ledger	Northtown	1st Aug. 19..	James Brown, 11 East Street, Northtown Grocer

EXECUTORS OR ADMINISTRATORS.		
NAME AND ADDRESS.	Description.	Amount of Probate.
William Brown, 178 Bridge Street, Northtown	Butcher (brother of deceased)	£2758
Annie Brown, 11 East Street, Northtown	Widow of deceased	

On the bankruptcy of a customer, any balance to his credit and any of his securities in the hands of the banker, which are not specifically held as cover for an advance, become vested in the trustee, and accordingly no operations on the account



and no dealings with such securities should take place unless they are authorised by that official, who is at liberty to draw out any credit balance, and to claim any securities not held by the bank as cover, upon giving satisfactory evidence of his appointment to the banker.

The question of payment of an insolvent person's cheques is dealt with in Chapter 14, where it will be noted that the banker's authority to pay cheques is revoked as from the date of the first available act of bankruptcy committed by his customer upon which a petition is founded. As a banker may easily be without notice of the committal of such an act or of the presentation of a petition or of the making of a receiving order, his position is frequently a difficult one, and it is for this reason that he should act with extreme caution if he has any suspicion that his customer is likely to become insolvent.

### Proof in Bankruptcy.

The course to be taken by a banker on the bankruptcy of a customer who has been granted an overdraft or loan will depend on whether the advance is (a) secured or (b) unsecured. In the latter case, the banker must prove against the bankrupt's estate in the same way as any other creditor by sending in an account of his debt in the prescribed form to the trustee in bankruptcy, or to the Official Receiver if no trustee has been appointed. The banker may prove for all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order. But he cannot prove for any debt incurred by the bankrupt after the bank has received notice that an act of bankruptcy has been committed by the debtor, or incurred after the date of the receiving order. Interest may also be claimed on the amount owing up to the date of the receiving order at the rate which the debtor has agreed to pay, but not more than 5 per cent. per annum can rank against the estate for dividend until all creditors have been paid in full. Interest on matured bills of exchange on which the debtor is liable may be claimed at the rate of 5 per cent. from the date of maturity to the date of the receiving order.

Where the debt is payable *at a future time* proof may be made in the bankruptcy for the full amount even though the debt is not yet due, but a rebate of 5 per cent. per annum is deducted from all dividends paid before the due date of the debt.

The proof must state the amount of the debt and the date when it was contracted, and must give particulars of any securities held by the banker. In the case of bills, the dates on which they were drawn and the dates of maturity must be given, together with the names of the drawers and acceptors, while

the bill itself must be produced for the inspection of the Official Receiver or trustee before the proof can be admitted.

The proof must be accompanied by an affidavit, verifying the debt, and must include particulars of any vouchers by which the claim can be substantiated. If the amount of the debt is over £2, the proof requires stamping with an impressed 1s. 6d. bankruptcy stamp.

If the banker is in the position of a secured creditor, by virtue of his holding a mortgage, charge or lien over any of the property of the bankrupt, he has one of four courses available to him in order to recover the amount due. He may: (a) rely on his security and not prove against the bankrupt's estate; (b) realise his security and prove for the balance (if any); (c) surrender the security to the trustee or Official Receiver and prove for the whole debt due to him; or (d) state in his proof the particulars and value of his security, and prove for the balance due to him after deducting the assessed value of his security. In the last case the trustee is entitled at any time to redeem the security at the value assessed by the creditor, or, if he is dissatisfied with the valuation, he may demand that it be offered for sale. In such circumstances the banker must deduct the amount realised by the sale from the amount due to him and prove for the balance.

In the event of the banker holding a guarantee or security deposited by a third party in respect of the debt due by the bankrupt, he may treat the security as *collateral*, and need not deduct its value from the amount of his debt before proving against the bankrupt's estate. This is of advantage both to the banker and to the third party, in that it enables the former to receive dividends from the bankrupt's estate on the *whole* amount of the debt before having recourse to the collateral security in order to make up the deficit. As is explained in Chapter 23, the guarantees and memoranda of deposit now taken by banks in this country provide that the banker shall have the right to prove against the principal debtor's estate for the *whole* amount due, and that any dividends received from the estate shall not prejudice the banker's right to recover from the surety the full amount for which he has agreed to accept liability, subject, of course, to the banker's not recovering in all more than 20s. in the £1. As a rule, also, the documents provide that the surety's right to prove against the debtor's estate is renounced in favour of the banker.

A banker who holds collateral security or a guarantee of a third party to secure a debtor's account, will usually proceed at once to fall back on such security as soon as he receives information of the bankruptcy of the customer. In the case of a guarantee, a demand for repayment will forthwith be made on the guarantor, as most bank guarantees provide that the guarantor shall be liable for the agreed amount *together with interest* from the date of demand until the date when payment is made.

### Distribution of a Bankrupt's Estate.

When the assets of the bankrupt have been realised, the proceeds are distributed by the trustee or the Official Receiver in the order prescribed by law. This is as follows: (1) the expenses connected with the bankruptcy proceedings; (2) *pre-preferential* debts, as for example, any unexpired portion of an apprenticeship premium; (3) *preferential* debts, as for example, (a) rates due and payable within twelve months prior to the receiving order, and taxes assessed up to the preceding 5th April; (b) wages of clerks and servants for four months prior to the receiving order, but not exceeding £50; (c) workmen's wages for two months prior to the receiving order, but not exceeding £25; (d) claims for compensation under the Workmen's Compensation Act; (e) contributions under the National Health and Unemployment Insurance Acts; (4) the debts of *unsecured* creditors, in proportion to the amounts of those debts; (5) the debts of *deferred* creditors. Deferred creditors include a wife who has advanced money to her husband for use in his trade or business, or a husband who has made similar advances to his wife, or a person who has lent money for business purposes in return for a rate of interest varying with the profits. All debts proved and admitted in the bankruptcy other than those of deferred creditors are paid *pari passu*, i.e., in proportion to the amount available, with interest at 4 per cent. per annum from the date of the receiving order after all debts have been paid in full. A banker, whether he is secured or unsecured, will, of course, rank as an *unsecured* creditor in respect of the amount for which he *proves* in the bankruptcy.

### Scheme of Composition.

A debtor against whom a bankruptcy petition has been presented may avoid the stigma and disabilities of complete bankruptcy by entering into a scheme of composition with his creditors. Such a scheme usually involves an arrangement between the debtor and his creditors by which the latter agree not to proceed with the proceedings in bankruptcy in consideration of the debtor undertaking to pay the whole or a portion of his debts by a series of fixed instalments.

A proposal for such a scheme may be put forward by the debtor at any stage of the bankruptcy proceedings, either before or after adjudication, but the consent of the court must be obtained with the approval of a majority in number representing three-fourths in value of the creditors who have proved in the bankruptcy.

When the sanction of the Court has been obtained, the scheme becomes binding on all creditors, subject to one or two unimportant exceptions, and if no order for adjudication has been

made the receiving order is rescinded. Where, however, the scheme is entered into *after the adjudication*, the Court will not always annul the order, and, if they refuse an annulment, the debtor will still suffer from many of the disabilities experienced by an undischarged bankrupt.

### Deeds of Arrangement.

A Deed of Arrangement is a voluntary agreement whereby a debtor assigns his property to a trustee for distribution among his creditors. If such a deed is made (a) for the benefit of the creditors *generally* or (b) by a insolvent trader for the benefit of three or more creditors, it will be governed by the *Deeds of Arrangement Act, 1914*, and will require registration with the Registrar of Bills of Sale. Where land is assigned by the deed it must also be registered with the Registrar of Land Charges by virtue of the *Land Charges Act, 1925*.

A deed of arrangement is binding only on those creditors who consent, and it usually constitutes an act of bankruptcy upon which a petition may be presented within three months of its execution. By giving notice of the assent of a majority of creditors to those who will not agree to the arrangement, the trustee may prevent such creditors from presenting a bankruptcy petition based on the deed after one month has elapsed from the date of the notice. A deed of arrangement will become void on the making of a receiving order within three months of its execution.

A deed of arrangement to be within the Act must be evidenced by some instrument or document, but it may be either under hand or under seal.

A banker should, of course, act with the greatest caution when he receives information that a customer has entered into a scheme of composition or a deed of arrangement, and, as the latter may constitute an act of bankruptcy, he should not pay any cheques on the relative customer's account after receiving notice of the deed, otherwise he may be compelled to refund their amount to the trustee.

### The Accounts of Infants.

In view of the strict limits to the contractual capacity of an infant, i.e., a person under twenty-one years of age (*see ante*, page 108), it is clearly most inadvisable for such a customer to be granted an overdraft or loan, but no serious difficulty should arise in practice in regard to an account which is kept in credit. As a rule, bankers do not open accounts for the very young, and the best course in *all* cases where the applicant is under sixteen years of age, is to open the account in the name of a parent or guardian, marking the account in such a way as clearly to indicate that it concerns the infant, as, for example, "Thomas Robinson,

account John Henry Robinson". If an advance is granted to an infant, the transaction is entirely void as against him, so that the banker will be unable to succeed in an action for repayment of the money, or to retain or realise any securities deposited by the infant in respect of the advance. He can, however, enforce his rights against any third party who has given a guarantee or deposited security in respect of an overdraft granted to an infant.

The fact that an infant has no general contractual capacity to bind himself does not prevent him from acting as an agent to bind a principal, and accordingly a banker who has written authority is safe in allowing an infant to draw or indorse cheques and bills, or to accept bills, or to overdraw his principal's account. Furthermore, as has already been stated, an infant may act as partner in a firm with power to bind his co-partners, but he cannot be held personally liable for any debts of the partnership contracted during his minority. In any case, a specific authority permitting an infant to operate on the partnership account should be taken by the banker from the remaining partners.

Finally, it must be noted that unless an infant is engaged on active service as a soldier or sailor, he cannot make a valid will, and, accordingly, any credit balance of which he may be possessed should not be transferred by the banker until letters of administration are produced by his next of kin. As an infant cannot be held liable in respect of his signature on a bill of exchange or cheque, a banker should not permit him to draw against uncleared items, otherwise difficulty may arise in the event of any cheque or bill paid into the infant's account being returned unpaid. On the other hand, the banker has every right to debit the amount of an unpaid cheque to any outstanding credit balance in the name of the infant.

### Accounts of Married Women.

Here, again, no special procedure is necessary and no difficulty should be experienced if the account is kept in credit, for, in the absence of notice to the contrary, the banker is justified in treating the account in the name of a married woman and the monies therein as belonging to the individual concerned, and this is so even if it may afterwards be shown that the funds really belonged to the husband who was insolvent. Unless the banker receives express or constructive notice that monies on the account of a married woman do not belong to her, his duty is to pay cheques drawn by his customer, and if he does so in good faith he obtains a good discharge.

As a rule, bankers will not grant an advance to a married woman unless they are specially safeguarded. If the advance is granted on the strength of the husband's position, his personal guarantee should be obtained, and if deeds or securities are de-

posited by the married woman in respect of the overdraft, they should be taken only after consultation with a solicitor and on the execution of a formal document of charge, for if the property concerned is subject to a restraint against anticipation (see *ante*, page 108), the married woman has no right either to deposit the deeds as security or to encumber the future income therefrom.

Unfortunately, no evidence of such a restraint is usually contained in the deeds concerned, so that in such circumstances a banker can safeguard himself only by making diligent inquiries. If, however, a married woman depositing deeds of property subject to a restraint is adjudged bankrupt, the Court has power, on the application of the trustee in bankruptcy, to order that all or a part of the income received from the property subject to the restraint shall be distributed amongst the creditors. In this connection it will be remembered that in accordance with Section 125 of the Bankruptcy Act, 1914, a married woman can be made bankrupt only if she carries on a trade or business either separately or with her husband. (See Chapter 7.)

Any property or funds of a deceased married woman must be dealt with by her personal representatives appointed in the usual way as executors or administrators. Accordingly, on the death of a married woman customer any securities or funds held by a banker on her account can be dealt with only by such representatives, and then only after exhibition of the relative probate or letters of administration.

Finally, it may be noted that there is nothing to prevent a married woman acting in all matters as an agent on behalf of another or others, as, for example, in drawing cheques on an account. Moreover, she may be appointed to the office of executrix, administratrix or trustee, but if she accepts duties of this kind her husband cannot be held liable for any of her acts or obligations in the performance of these duties unless he interferes or intermeddles in the executorship, administration or trust.

### Accounts of Persons of Unsound Mind.

A banker would not knowingly open an account for a person of unsound mind, but considerable care is necessary if such an account is inadvertently opened, or if an existing customer becomes insane. In the former case the banker might "easily be involved in the difficulty of choosing between the risk of unjustifiably dishonouring the customer's cheque on the one hand, and of being held to have debited his account without adequate authority on the other".<sup>1</sup> It must be remembered that the mandate contained in a cheque is terminated by the insanity of the person who gave it, and accordingly a banker must not pay cheques drawn by a customer if he has reliable

<sup>1</sup> Hart, *Law of Banking*, page 138.

information of the drawer's insanity, although cheques paid by the banker before receipt of such notice are apparently in order.

Upon receipt of reliable information that a customer has become insane, the banker should suspend all operations upon the account until he receives definite proof of the customer's recovery, or is notified of the appointment by the Court of a Receiver or Committee, in whom is vested the management of the affairs of the insane customer under the direction of the Commissioners in Lunacy. When a person is thus found lunatic by inquisition, the sole power to transact business in connection with the estate, including the drawing of cheques on the lunatic's account, is usually vested in the Receiver or Committee, and this power continues until the inquisition is annulled by the Court.

The banker should always insist on production of the document appointing the receiver, and should carefully scrutinise it in order to ascertain the exact scope of his powers, for such powers may be limited to dealing only with the *income* of the estate and may not extend to dealing with *capital* or securities in the banker's hands.

The case where a person is certified as insane after careful inquiry by a Master or Commissioner in Lunacy, is to be distinguished from mere temporary mental derangement or loss of memory. In such circumstances a banker is quite justified merely in suspending operations upon the account until the customer recovers, or, alternatively, in permitting the customer's wife or other near relative to operate thereon, although in the latter case it is advisable to obtain a satisfactory indemnity against any claims which may be made against the banker by reason of the concession.

### Joint Accounts other than Partnership and Trust Accounts.

On opening a current account in the joint names of two or more persons who are not partners, the banker should take a mandate signed by the persons concerned, embodying instructions as to how the account is to be operated and clearly setting forth how cheques and bills are to be signed and indorsed (see the specimen on the next page). Unless the parties specifically indicate that they wish to delegate their authority to sign cheques to one or some of their number, or to an outside person (in which case the mandate on pages 520-521 must be used), all cheques and other instructions to the banker must be signed by all the parties, and in the absence of such authority a banker should in no circumstances pay cheques which purport to be signed by one or some persons on behalf of all.

If the arrangement is that cheques are to be signed by all the parties, the mandate cannot be varied unless all the parties

concur, but the banker's authority to pay is not revoked by the death of one of the signers. On the other hand, if authority to sign has been delegated to one of the parties, cheques signed by that person may be stopped by any of the others, for any party to a joint account has a right at any time to revoke an authority given by him jointly with others. Moreover, a banker should not

Joint and Several Letter for Current Account in Joint Names

17th September, 19...

To

THE NORTHERN BANK LIMITED

We hereby request and authorise you, from time to time, until we shall give you notice to the contrary in writing under our hand, to pay and honour all cheques which may be drawn by\* *either of us on our behalf*, and place the amount of all such cheques to the debit of our Banking Account or Accounts for the time being with your Bank at *Northtown*, whether such Banking Account or Accounts are in credit overdrawn or otherwise, at the time such cheques are presented to you for payment.

\* *Insert—*  
 "us" (if all the parties are to sign)  
 "either of us on our behalf" (if either party is to sign)  
 "any two of us on our behalf"  
 or  
 "any three of us on our behalf" as may be required.

We do also hereby authorise either of us to pay Moneys, Cheques, Notes, Drafts, Orders, and all other documents to the credit of our said Banking Account or Accounts, and when needful to endorse the same per procuration for us or on our account; and from time to time on our behalf to certify the correctness of the said Banking Account or Accounts, and receive the Cheques and other Vouchers relating thereto.

It is understood that any Balance which may now or hereafter stand to the credit of our said Banking Account or Accounts shall belong to the Survivor or Survivors absolutely, in the event of any or either of us dying while such accounts continue.

We hereby acknowledge that our liability by way of overdraft or otherwise at any time in respect of such Banking Account or Accounts in our joint names shall be several as well as joint.

James Brown.  
 Thomas Robinson.

pay cheques drawn on a joint account by *one* of the parties if he has notice of the death of the person whose signature appears on the instrument.

The general rule of law is that on the death of any party to a joint account the balance vests in the survivor or survivors, but such survivor or survivors are in the position of trustees in regard to any portion of the funds which properly belonged to the deceased's estate. It is, however, always advisable in such cases for the banker to have express instructions embodied in the mandate relative to the manner of dealing with the balance of the account in the event of the death of any of the parties, in order that no complications may arise if the personal representatives of the deceased seek to exercise rights over the balance. If it is desired that such representatives shall have an interest in the account, specific instructions to that effect should be embodied in the mandate.

On the death of any of the parties to a joint account on which all parties have to sign, the account should be stopped until satisfactory evidence of the death is produced to the banker.



When this is done, the survivor or survivors should be permitted to deal with the balance by transferring it to a new account opened in their names subject to any arrangements to the contrary as to the participation of the deceased's personal representatives. If, however, the mandate relating to such an account specifically provides that cheques may be drawn by one or some of the parties, then on the death of one the balance may, of course, be withdrawn by the survivor or survivors and proof of the death is not strictly necessary.

The mandate relative to a joint account will usually include an undertaking by the parties to be *jointly and severally* responsible for any overdraft. Such an undertaking is essential if an advance is contemplated, for in its absence the survivor or survivors will be alone responsible for the repayment of an advance on the death of one of their number. If such an undertaking is not obtained the parties are jointly, but not *jointly and severally*, liable for any overdraft, so that on the death or bankruptcy of one of the parties, his estate becomes freed from liability, subject, however, to the fact that although there may be no *legal* claim against the estate of a deceased party, that estate may be reached by administration proceedings in *equity*.

Even where the joint and several liability of the parties to a joint account is secured by the mandate, it is advisable for the banker to safeguard himself further by taking from the persons concerned a joint and several guarantee in respect of any overdraft which may be granted. The mere fact that two or more persons are parties to a joint account does not of itself enable them to pledge each other's credit, and, accordingly, a banker should in no circumstances permit an overdraft to be created by the drawing of cheques unless the liability of the parties is secured by provisions in a mandate signed by them all.

Upon notice of the insanity of a party to a joint account, the account should be stopped pending receipt of instructions from the Court, unless the survivor or survivors are given authority, in the mandate, to draw cheques and deal with the balance.

If one of the parties to a joint account commits an act of bankruptcy, the banker should stop all operations on the account, and should return all cheques drawn by any of the parties which are thereafter presented. Operations on the account should be resumed and future cheques paid only after the receipt of joint instructions from the solvent party or parties and the trustee in bankruptcy.

In view of the decision in *Greenhalgh v. Union Bank of Manchester*, 1924 (see page 176), it would appear that a banker cannot set-off a credit balance on the account of an individual against a liability which may be incurred by him jointly with others, unless there is some express or implied agreement permitting the amalgamation of the accounts in order to determine the net liability.

The remarks in the foregoing paragraphs apply only if the banker has no notice of any trust in connection with the joint account, for if such is the case the account should be dealt with in accordance with the principles relative to trust accounts which are explained below.

### Deposit Account in Joint Names.

The principles relating to the conduct of a deposit account in joint names are generally similar to those governing a credit current account, such as are discussed in the preceding paragraphs.

In the absence of a mandate, the signatures of all parties to a joint deposit should be required for withdrawals, although, by the right of survivorship, the balance on such an account vests in the survivor or survivors on the death of one of the parties.

In practice, bankers endeavour to avoid any difficulty in connection with such accounts by taking a mandate in the following form, providing that any one of the parties may withdraw and that the balance of the account shall vest in the survivor or survivors on the death of any of the signatories :—

#### Letter of Authority for a Joint Deposit Account

17th September, 19..

To

THE NORTHERN BANK LIMITED.

GENTLEMEN,

We hereby request and authorise you from time to time, until we or any or either of us shall give you notice to the contrary in writing, to pay all moneys which may be now or hereafter from time to time deposited with you in our joint names, together with all interest thereon, to any or either of us.

It is understood that all moneys now or hereafter from time to time deposited with you, as aforesaid, shall belong to the survivors or survivor of us absolutely in the event of any or either of us dying while such deposits continue.

*James Brown.*  
*Thomas Robinson.*  
*William Black.*

On the bankruptcy or insanity of a party to a joint deposit, the banker should act in accordance with the rules laid down above in connection with credit current accounts.

### Accounts in the Names of Husband and Wife.

In the absence of express instructions to the contrary, a joint account in the names of husband and wife can be regarded as an ordinary joint account, but care should be taken to see that the mandate specifically provides for the disposal of the balance in the event of the death of either party. If this is not done, it might be claimed by the husband's personal representatives <sup>as</sup> at the balance (if any) forms part of his estate, in which event <sup>satis</sup>ould not be claimed by the wife for her own immediate use

although it may have been the intention of the parties that the balance should revert to the wife in the event of the husband's death.

In other respects the mandate on such an account should be similar to that of an ordinary joint account, and should specify how and by whom cheques are to be signed.

### Account with An Undischarged Bankrupt.

In Chapter 7 it was explained that a person who has been adjudicated bankrupt suffers from a number of civil and contractual disabilities until he obtains an order of discharge from the Court. From a banker's point of view, the most important of these disabilities are, firstly, that an undischarged bankrupt must not conduct a banking account unless the trustee or the Board of Trade is informed of its existence by the banker and, secondly, that such a person must not obtain credit from any one person in excess of £10 without disclosing the fact that he is an undischarged bankrupt.

The provisions in this regard are contained in Sections 155, 156, and 47 of the Bankruptcy Act, 1914, and read as follows :—

155. Where an undischarged bankrupt—

- (a) either alone or jointly with any other person obtains credit to the extent of ten pounds or upwards from any person without informing that person that he is an undischarged bankrupt ; or
- (b) engages in any trade or business under a name other than that under which he was adjudicated bankrupt without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt ;

he shall be guilty of a misdemeanour.

156. If any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made—

- (a) in incurring any debt or liability has obtained credit under false pretences or by means of any other fraud ;
- (b) with intent to defraud his creditors or any of them, has made or caused to be made any gift or transfer of, or charge on, his property ;
- (c) with intent to defraud his creditors, has concealed or removed any part of his property since, or within two months before, the date of any unsatisfied judgment or order for payment of money obtained against him ;

he shall be guilty of a misdemeanour.

47. (1) All transactions by a bankrupt with any person dealing with him bona fide and for value, in respect of property, whether real or personal, acquired by the bankrupt after the adjudication, shall, if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction.

This sub-section shall apply to transactions with respect to real property completed before the first day of April nineteen hundred and fourteen, in any case where there has not been any intervention by the trustee before that date.

For the purposes of this sub-section, the receipt of any money, security or negotiable instrument from, or by the order or direction of, a bankrupt by his banker, and any payment and any delivery of any security or negotiable instrument made to, or by the order or direction of, a bankrupt by his banker, shall be deemed to be a transaction by the bankrupt with such banker dealing with him for value.

(2) Where a banker has ascertained that a person having an account with him is an undischarged bankrupt, then, unless the banker is satisfied that the account is on behalf of some other person, it shall be his duty forthwith to inform the trustee in the bankruptcy or the Board of Trade of the existence of the account, and thereafter he shall not make any payments out of the account, except under an order of the court or in accordance with instructions from the trustee in the bankruptcy, unless by the expiration of one month from the date of giving the information no instructions have been received from the trustee.

For our present purpose, the provisions of Section 47 are of great significance. It will be observed that the first sub-section protects certain transactions by undischarged bankrupts provided that the property concerned has been acquired by the bankrupt *after his adjudication*, and brings within the sphere of this protection receipts of money, securities or negotiable instruments by a banker and payments of money or deliveries of securities or negotiable instruments by a banker.

Thus, if a banker delivers to a bankrupt customer securities which the latter has acquired *after his adjudication*, or pays out to such a customer—or on his instructions to a third party—money standing to his credit, the transactions will be protected as against the trustee in bankruptcy, but if the property or money delivered had been acquired by the bankrupt *before his adjudication*, no protection would be afforded, and the banker would be accountable to the trustee in bankruptcy for the value or amount of such property or funds.

The protection afforded by Sub-section 1 does not, however, release the banker from the duty imposed by Sub-section 2, so that notice of the existence of the account of an undischarged bankrupt must be given to the trustee in bankruptcy or the Board of Trade *in every case*. If after the expiration of one month from the giving of such notice no instructions are received by the banker, property or funds acquired by the bankrupt *after the adjudication* may be dealt with in safety, although even in such circumstances it would be advisable to apply to the Court for instructions.

In practice, the protection afforded by Sub-section 47 (1) is not very material, since a banker has no means of knowing whether or not property or funds which are passed to him by an undischarged bankrupt have been acquired after the adjudication. As a rule, he has only the customer's word to rely upon, and if that proves to be worthless, the banker will be compelled to refund to the trustee the value of any property or the amount of any funds which have been wrongly dealt with by the bankrupt. Moreover, the banker's position is a difficult one if

he unknowingly transacts business with a bankrupt who has not obtained his discharge, for if such a person opens an account with monies which are not *after acquired*, and the funds are paid away to the drawer or third parties, the bank will be called upon to make good the amounts to the estate.

Consequently, a banker should not conduct an account with an undischarged bankrupt unless he first obtains the consent in writing of the trustee or of the Board of Trade. Furthermore, if he discovers that a customer is an undischarged bankrupt, he should at once stop the account and notify its existence to the trustee or the Board of Trade. Any cheques of the bankrupt presented subsequent to the receipt of notice by the banker must be returned unpaid marked "Refer to drawer".

Sometimes an undischarged bankrupt seeks to evade his disability by opening a current account in the name of a nominee, but a banker with knowledge of the true circumstances should not open or continue such an account without the consent in writing of the trustee or the Board of Trade.

### The Accounts of Trustees.

If a banker has information that an individual or joint account in his books is conducted for the purposes of a trust, he should see that a clear indication of the fact is placed at the head of the relative ledger account, either when the account is opened or subsequently when the matter comes to his notice, otherwise circumstances *may* arise in which he will render himself liable for having knowingly become a party to a breach of trust. The fiduciary nature of an account may be indicated in a number of ways, as, for example,

- "Thomas Robinson, a/c James Brown deceased";
- "Thomas Robinson, Rate Account";
- "Thomas Robinson and Henry Brown, Trustees of William Brown";
- "Thomas Robinson and Henry Brown, Overseers of the Parish of St Michael's".

All cheques drawn on such accounts should be clearly marked to coincide with the ledger heading.

The mere fact that there is some special addition to the heading of a customer's account does not necessarily imply that the funds in such an account are trust funds, even though the customer concerned has another account or accounts in his own name without any such additions. Customers, for their own convenience, frequently require an account to be distinguished in a certain specific manner, and agree to mark all cheques intended to be drawn on that account in the same way, such as, "Thomas Robinson, No. 2 Account", "Thomas Robinson, B account"; "Thomas Robinson, Motor account", or "Thomas

Robinson, Firm account". Moreover, the fact that an account is headed "Thomas Robinson *re* James Brown" does not necessarily indicate a trust account, nor does the fact that a banker knows that solicitors, stockbrokers and auctioneers have to handle funds belonging to others in the course of their business, necessarily mean that he should regard accounts in the names of such persons as containing trust funds, although the account may be marked "Office Account" or "Business Account" or "Client's Account".

But wherever a banker has information or suspicions that an account is a trust account, it is advisable to make the matter quite clear by specifying the fact in the ledger heading and upon the pass book, for if the banker becomes a party to a breach of trust, and it can be shown that he had notice of the fiduciary character of the account, he cannot escape liability merely on the ground that there is no indication of the fact in the heading of the account as it appears in his books.

The general method of conducting trust accounts differs in no wise from that of other personal accounts, except that a banker with notice of the fact that an account relates to trust money, must not be a party to any dealings with the trust funds by the customer if such dealings are inconsistent with the latter's duties as a trustee.

In the conduct of a trust account the banker must not only recognise his duty to honour his customer's cheques; he must also consider the interests of the persons entitled to the benefits of the trust. But this fact does not establish the banker as a private detective entitled to suspect and investigate all operations of his customer on the account concerned. He is not liable in respect of a breach of trust so long as he cannot be regarded as being a party thereto or having received notice thereof, and as to what would constitute such notice is a question of fact which must be determined by the circumstances.

Undoubtedly, the banker would be affected with notice of the breach if he derives some personal benefit from the breach, as, for example, where a customer has an overdrawn private account, and on the *express* demand of the banker for a reduction, *transfers* thereto funds from a trust account in his name. In such circumstances the banker would be liable to refund the amount to the beneficiaries of the trust. Moreover, by virtue of the decision in *John v. Dodwell*, 1918, it would appear that a banker will render himself liable to the beneficiaries in any circumstances where trust funds are transferred on a trustee's instructions to reduce a private overdraft of the trustee, whether there is a demand by the banker for reduction or not.

But the position respecting the liability of the banker for breach of trust is not quite so clear where a customer draws a *cheque* on a trust account either in payment of a private debt to a third party or in reduction of a private debt due to the

banker. The legal decisions on the point are not altogether convincing.

In the past, the view appears to have prevailed that it is not the duty or right of a paying banker to question the validity of a cheque drawn by his customer against funds under his control, or to set up the claims of third parties (i.e., the beneficiaries under a trust) against the mandate of his customer. Thus in *Gray v. Johnston*, 1868, it was laid down that, "Supposing the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust and draws a cheque for that purpose, the banker, not being interested in the transaction, has no right to refuse payment of the cheque, for, if he did so, he would be making himself a party to an inquiry as between his customer and third persons. He would be setting up a supposed *jus tertii* (right of a third party) as a reason why he should not perform his own distinct obligation to his customer".

More recent decisions, however, have laid down a much stricter principle. Thus in *Foxton v. Manchester & Liverpool District Banking Co.*, 1881, it was held that a bank must refund the amount of a cheque drawn on a trust account and paid into a private overdrawn account. In that case the judge said: "The bank could not derive the benefit which they did from that payment, knowing it to be drawn on a trust fund, *unless they were prepared to show that the payment was a legitimate one, having reference to the terms of the trust*". Again, in *Coleman v. The Bucks & Oxon Union Bank*, 1897, the judge maintained that, "if bankers have the slightest knowledge or reasonable suspicion that the money is being applied in breach of trust, and if they are going to derive a benefit from the transfer, then I think the bankers would not be entitled to honour the cheque drawn upon the trust account without some further enquiry into the matter".

Sir John Paget, in reviewing the foregoing decisions, suggests that, "On the stricter lines now obtaining with regard to dealing with trust funds, it might well be that a banker would be held liable for parting with the money to a third person, even on a cheque, if the circumstances were such that he must have known it was a misapplication of the funds, albeit no personal benefit accrued to the banker". He proceeds: "In the author's opinion, the course dictated by expediency, if by no higher motive, is for a banker scrupulously to abstain from being party or privy to any operation on an account known to be a trust account, involving benefit to the banker, even indirect and unasked for, through the medium of overdrawn private account or otherwise, and whether or no a cheque is concerned".<sup>1</sup>

It may be added that a banker would undoubtedly be guilty of a breach of trust in crediting to a customer's private account cheques payable to him in a fiduciary capacity or payable to the

<sup>1</sup> *Law of Banking*, 3rd edn., pages 52 and 56.

trust with which he is vested. To do so would undoubtedly deprive the banker of the protection of Section 82 on the grounds of negligence.

On the opening of a trust account in joint names a banker should take a mandate providing that cheques are to be signed by *all* the parties to the account, and, unless the trust deed expressly provides that one or some of the trustees may sign on behalf of all, the banker should refuse to accept a mandate, purporting to delegate authority to sign to one or some of the trustees. But even where the arrangements provide that cheques are to be signed by all parties to the account, the banker must act on a countermand of payment even if it is signed by only one of the trustees. A banker cannot in any circumstances set-off a credit balance on a trust account against an advance or liability due to him by a trustee on his private account, nor should a banker in any circumstances grant an advance on a trustee's private account against security which he knows to be trust property.

The circumstances in which trustees are permitted to delegate their authority are explained in Chapter 7, from which it will be observed that, as a general rule, a banker should not accept a mandate from trustees empowering one of their number or a third party to operate on the trust account.

Trustees have no right to obtain advances on the security of trust property unless specific authority is given by the trust instrument, but an exception to this general rule is made by Section 16 of the *Trustee Act, 1925*, which allows trustees to mortgage or charge trust property in order to raise monies for the purpose of the trust. Moreover, if an overdraft is granted on a trust account, the banker may hold the trustee or trustees personally liable. When a customer deposits with a banker as security for a private advance *negotiable* securities, such as bearer bonds, which in reality belong to a trust, the banker will nevertheless be able to retain them if he acts in good faith and without notice that the securities are trust property. But this does not apply to registered securities taken under a blank transfer even though they are in the customer's own name, for a banker can obtain undisputed property in such securities only by having them registered in the names of himself or of his nominees.

### **Effect of Death of a Trustee on a Trust Account.**

In the absence of anything to the contrary in the trust deed, the duties and obligations of a trusteeship become vested in the surviving trustee or trustees on the death of one of their number, but if such an event occurs, the banker should satisfy himself that no special provisions on the matter are contained in the deed before permitting the survivor or survivors to operate the account or deal with any trust property in his hands. If the deed provides for the appointment of a new trustee, the account



should be stopped until the banker is notified in writing of the appointment and is supplied with the signature and particulars of the person appointed.

Upon the death of a sole trustee or the last survivor of a number of trustees, new trustees may be appointed in accordance with the terms of Section 36 of the *Trustee Act*, 1925, but pending such an appointment, the personal representatives of the deceased sole trustee may exercise any power or trust which could have been exercised by the deceased trustee. Upon production of probate or letters of administration, therefore, the banker should allow such a personal representative to deal with the trust account as if he were a trustee.

### Effect of Bankruptcy of a Trustee on a Trust Account.

The bankruptcy of a trustee does not involve any trust property in his hands, for such property belongs to the beneficiaries and cannot be claimed by the private creditors of the trustee. Moreover, the bankruptcy of a trustee does not affect his rights to deal with trust property for the purpose of the trusteeship, although in such circumstances it may be desirable to apply to the Court for the appointment of a new trustee in accordance with the powers in this regard given by Section 41 of the *Trustee Act*, 1925. In the case of a trustee in bankruptcy, a new appointment *must* be made if the trustee himself becomes bankrupt.

### Trustees in Bankruptcy and Liquidators of Companies.

As is pointed out in Chapter 7, trustees in bankruptcy and liquidators of companies are not permitted to open accounts at local banks unless authority is first obtained from the Board of Trade in the case of trustees and from the Court in the case of liquidators. If, however, such an account is opened, the banker should make himself thoroughly acquainted with the provisions of the relative Act concerning the conduct of the account and the drawing of cheques, in addition to any special regulations which may be made by the Committee of Inspection, where such a committee exists in the case of a bankruptcy, and by the Court in the case of liquidation.

Thus the Bankruptcy Rules, 1915, provide that all cheques on the account of a trustee in bankruptcy shall bear the name of the debtor's estate and shall be drawn payable to order, being signed by the trustee and countersigned by at least one member of the Committee of Inspection, where such a committee exists, or by a person appointed by the creditors or Committee of Inspection, or by a person appointed by the Board of Trade. As a rule, the signature of the trustee alone is accepted by bankers—a practice of doubtful legality.

In regard to the liquidation or winding up of a registered joint-stock company, Rule 165 of the *Companies (Winding-up) Rules, 1909*, provides that where a special account is opened all payments out are to be made by cheques payable to order, bearing the name of the company, to be signed by the liquidator and countersigned by at least one member of the Committee of Inspection and by such other person, if any, as the Committee may appoint.

If there is no Committee of Inspection, the Official Receiver may exercise the functions of such a committee subject to the directions of the Board of Trade. Apart from these general provisions, the powers of a liquidator responsible for the winding up of a company are strictly defined in writing by the Court by which he is appointed, instructions being given as to how cheques are to be signed, whether they are to be signed by one or both liquidators (if there are more than one), and whether the signing of cheques and other acts have to be confirmed by the Committee of Inspection. If, therefore, such an account is kept at a local bank, the banker must inspect the document appointing the liquidator and see that the instructions are obeyed so far as the signing of cheques and the general conduct of the account is concerned. A liquidator has power to raise money on the security of the company's assets if necessary for the conduct of the liquidation, but care should be taken that assets so charged are free from the claims of mortgagees and debenture-holders. The liquidator incurs no personal liability in respect of these advances, in the absence of specific agreement.

### **The Accounts of Executors and Administrators.**

The accounts of executors (which for present purposes may be regarded as including the accounts of administrators) are, of course, merely trust accounts of a special kind, subject to the important difference that, as executors may delegate their authority to one of their number, the signature of one executor is sufficient to bind all parties to the account, whereas such a delegation of authority can be made by trustees only in exceptional circumstances.

As a general rule, the executorship account is opened by the transfer thereto of the credit balance standing in the name of the deceased, the cheque authorising the transfer being signed, if possible, by all the executors. Such a transfer should not be made until probate (or letters of administration) have been produced and particulars thereof duly recorded by the banker in his *Register of Probates*, a note of the names of the executors and a reference to the page of the executorship account being placed on the deceased customer's account. The executorship account should be opened in the joint names of the executors, and the description "Executors of Thomas Robinson deceased", placed

either across the heading of the account, or after the names of the executors.

Although a banker is quite justified in accepting the signature of one executor on behalf of all, the best course in opening an account is to take the usual joint and several mandate signed by all the parties, embodying precise instructions as to how cheques and bills are to be signed and indorsed, and holding all the parties personally and individually liable in respect of any overdraft which may be created. If the mandate distinctly provides that cheques are to be signed by two or more of several executors, the signature of one only should not be accepted. On the other hand, if no instructions are given, but the banker is notified by one executor that cheques are to be signed by all the parties, he must see that the instruction is carried out.

The banker should not accept a mandate authorising any *outside* person to operate on an executorship account, for although executors may delegate their authority to one of their own number, they cannot empower any other person to act on their behalf, except for business which is usually transacted by such agents as solicitors, stockbrokers or auctioneers.

Even where all executors usually join in signing cheques, any one of the number may effectively countermand payment of a cheque so signed although it bears his signature, and, where arrangements have been made for either of two executors to operate an account in their joint names, one of the parties may stop payment of a cheque signed by his co-executor.

Frequently, the personal representatives of a deceased person are called upon to make payments in respect of debts due by the estate before probate or letters of administration have actually been granted, and in such circumstances it is usual to apply to a banker for temporary accommodation. Before granting an advance of this kind the banker should satisfy himself, e.g., by a perusal of the will if a will exists, that the persons concerned are entitled to deal with the property and affairs of the deceased. His safest course is to make all the parties jointly and severally responsible for the overdraft by obtaining their signatures to a joint and several guarantee or undertaking in the form shown on page 544, if necessary insisting also on the deposit of collateral security by one or some of the executors. Even after the grant of probate or letters of administration, the personal representatives have no power to borrow money so as to bind the *general* estate of the testator, but, unless they are expressly forbidden to do so by the will, they can give the lender a charge over *specific* assets belonging to the estate. Accordingly, if a banker requires any security in respect of an overdraft in addition to the guarantee of the executors, he should take the signatures of all the executors to a definite charge over some specific assets forming part of the estate, as, for example, a mortgage over specific property or a blank transfer of shares. In the absence of precise

arrangements of this kind a banker is not entitled to retain any securities belonging to the deceased in respect of advances granted to the personal representatives, nor can he levy execution against the general assets of the estate in respect of a loan granted to such representatives.

If, however, the account of the deceased person is overdrawn at the time of death, the banker is, of course, entitled to retain in respect of the advance any securities which are in his hands (other than securities or valuables deposited for safe custody),

**Request for an Advance and Undertaking by Executors**

To

**THE NORTHERN BANK LIMITED**

*Re James Brown, DECEASED.*

I/We, the undersigned, Executor(s) under the Will of the above-named deceased hereby request you to advance to me/us or allow me/us to overdraw an Account to be opened in my name/our names to an extent not exceeding £250 for the purpose of paying Estate Duty, etc., on applying for probate of the said Will, and in consideration of your so doing I/we undertake to hold myself/ourselves jointly and severally responsible for the repayment on demand of such advance or overdraft with interest with half-yearly rests, commission, and other customary charges, and (without prejudice to my/our personal liability) to repay the same from the first funds that come into my/our hands from the Estate of the said deceased.

Dated this 17th day of September, 19...

Witness to the signatures of

*William Brown*  
and

*Thomas Robinson*

who I certify is/are the  
Executor(s) named in the  
Will of the above-named  
deceased.

*Henry Abbott*  
(Solicitor to the Executor(s).)

SO. .....W <i>William Brown</i> ..... .....T <i>Thomas Robinson</i> ..... STAMP.
---

[The alternative words will be deleted as is necessary.]

until the advance is paid off by the personal representatives. If such representatives do not repay the advance, the banker can take steps to realise his security, transferring the balance, if any, to the executors. If the amount of security held is inadequate to repay the loan, the banker is entitled to call upon the executors to pay the balance out of the general estate, and if this is not done, he can enforce payment of the amount due to him against the estate. Unless he is authorised to do so, a banker is not entitled to transfer from an executorship account an amount sufficient to discharge any outstanding liability of the deceased.

For any such transfer he should get specific authority in the form of a cheque signed by all the representatives.

It sometimes happens that the same persons are appointed both as executors and as trustees under the will of a deceased, the executors being, first of all, required to wind up and administer the estate and thereafter to act as trustees for some or all of the beneficiaries. In such circumstances it is not always clear when the executors cease to function as such and when they become essentially trustees, a point which is of importance in view of the fact that, although one executor may usually act on behalf of all, trustees cannot so delegate their authority except in special circumstances. Thus, in the case of *Attenborough and Sons v. Solomon*, 1913, the debts, funeral and other expenses of a testator had been paid by two executor-trustees acting under a will, and, thereafter, one of the parties pledged certain property belonging to the estate for his own purposes without the knowledge of his co-executor. It was held by the House of Lords that the parties had ceased to function as executors at the time of the pledge, and that, as they were then trustees, the authority of both was necessary to pledge the property. Consequently, the pledgee was not entitled to retain the property pledged as against the trustees in spite of the fact that he had no knowledge that it belonged to the trust. It follows, therefore, that in all cases where persons act as executor-trustees the banker's best course is to require the signature of all the parties to any transactions other than those which clearly arise out of the winding up of the estate.

Finally, it should be noted that as executors are strictly trustees of the property which they have to administer, a banker or other person may render himself liable if he becomes a party to a breach of trust or misapplication of the funds of the estate by an executor.

### The Accounts of Partnerships.

The account of a partnership in the books of a banker is usually opened in the name of the firm, a note of the names of the partners being added to the heading. When the account is opened, the banker's usual mandate should be taken, embodying instructions as to how cheques and bills are to be signed on behalf of the firm, and also incorporating an undertaking of the partners to be jointly or severally liable for any overdraft which may be created. A specimen form of such a mandate is shown on the next page.

The mandate should be signed by each of the partners in his own name, and, if he is authorised to sign on behalf of the firm, he should sign his own name and also the name of the firm both on the mandate and in the banker's Signature Book or Signature Index.

Although, in the case of a trading partnership, every partner has implied power to bind the firm by drawing, indorsing or accepting bills of exchange, except as to any person who has notice that a partner has been restricted from so acting, no banker would pay cheques or honour other instruments bearing the signature of any partner who was not empowered to sign in the mandate given to the banker when the account was opened or subsequently.

**Letter of Authority and Undertaking for a Partnership Account**

To

**THE NORTHERN BANK LIMITED**

We, the undersigned, being the individual Partners in the Firm of *Brown, Jones and Company*, hereby request and authorise you to honour our respective signatures, as under, for all purposes, on behalf of our said Firm, and we agree that we shall be jointly and severally liable for any liability so created.

Dated this 17th day of June, 19...

Signatures of all the Partners.	{	John Brown. William Jones. Henry Williams.
---------------------------------------	---	--

(Full Names of Partners.)

(Specimen Signatures of Firm.)

John Brown	will sign	Brown, Jones & Co.
William Jones	will sign	Brown, Jones & Co.
Henry Williams	will sign	Brown, Jones & Co.

Any partner has implied power to open a banking account in the firm's name and so bind the partnership, but he cannot bind the firm by opening an account *in his own name* unless he has been expressly so authorised by all the partners. Bankers usually insist, however, on the account being opened by all the partners, taking a mandate signed by them all specifying how the account is to be operated, and who is authorised to sign cheques and other instruments.

If there is only one partner in the firm a mandate in the following form should be taken from that partner indicating clearly how he proposes to sign and indorse on behalf of the firm:—

**Letter of Authority by an Individual trading as a Firm**

To

**THE NORTHERN BANK LIMITED**

I, the undersigned, who carry on business in the name of *The Empress Trading Company*, at 40-42 New Street, Northtown, hereby request and authorise you to honour my signature, as under, for all purposes.

Dated this 1st day of June, 19...

(Personal Signature)	Thomas Caston.
(Business Signature)	The Empress Trading Co.

All partners should join in an authority to enable an *outside* person to operate the firm's account, and the mandate should distinctly provide whether or not the authority is to apply if the firm's account is overdrawn.

Any one partner has power to countermand payment of a cheque drawn on the firm's account either by all the partners, including himself, or by another partner or by a third party.

On opening an account for a partnership, the banker should obtain as much information as possible concerning the business of the firm, the nature of its assets and liabilities, and the proportion of capital contributed by each partner. If an overdraft is required, information should also be obtained as to the necessity for the advance, the way in which it is proposed to utilise the funds, and the extent, if any, to which a firm is already trading on borrowed capital. It is always desirable also to obtain a copy of a statement of affairs or balance-sheet of the firm drawn up by the partners, and if possible audited by some independent person. (See specimen on page 523.)

In accordance with the principles enumerated in Chapter 15, a banker should exercise extreme care before accepting for the credit of a partner's private account cheques drawn or indorsed by him on behalf of the firm, otherwise the banker may be held to be guilty of negligence if there is any question of misappropriation of the instruments. As a general rule the banker cannot question a cheque drawn by a partner in his own favour on a firm's account, but he would certainly be regarded as having been put on inquiry if he had pressed for a reduction of a partner's private debt and that partner had drawn a cheque on the firm's account in order to meet the banker's demands.

As a rule, the partnership mandate will contain an undertaking on behalf of the partners to hold themselves jointly *and* severally liable in respect of any overdraft or loan granted to the firm, but in addition it is usual to take the signatures of all the partners to a joint and several guarantee. *All* the partners should also sign any document charging property of the partnership as cover for a loan or overdraft granted to the firm. Such a safeguard is advisable in spite of the fact that any partner in a *trading* firm has implied power to pledge its credit, to borrow money, and to sell or pledge its property for the purposes of the partnership business. In the case of guarantees and legal mortgages *under seal*, all the partners must sign individually, for one partner has no implied power to bind his co-partners by giving a guarantee or by executing a deed in the name of the firm, unless in the former case it is the practice of the firm or a recognised part of its business to give guarantees.

Nevertheless, in the event of one partner only signing a document purporting to give the banker a legal mortgage or charge over property of the firm, all the partners will be *equitably*

bound, i.e., the banker's claim in respect of the property may be postponed to any rights of prior parties, though he will be entitled to demand a legal mortgage signed by all the partners in respect of the debt due by them.

In the absence of an agreement, a banker is not entitled to set-off a credit balance on the private account of a partner against a debt due to him by the firm, nor can he set-off a credit balance on the firm's account against an overdraft on a partner's private account.

In the case of a *non-trading* firm, such as a firm of doctors, or solicitors, a partner therein has no implied authority to bind the firm by bills of exchange or promissory notes, or to borrow money on behalf of the firm, or to pledge its property as security for an advance. Consequently, in dealing with a non-trading partnership a banker should require the signature and authority of *all* the partners in respect of all operations connected with the account, but there is, of course, no objection to his taking a mandate signed by all the partners giving one of their number or an outside person authority to operate on behalf of the firm. If a partner in such a firm signs the firm's name to a negotiable instrument or seeks to bind it in any other way without having express authority to do so, that partner will be personally liable, but the other partners will not be bound.

### Treatment of a Firm's Account on Dissolution.

As has been indicated in Chapter 8, a partnership is dissolved by any change in its constitution following the death, retirement, or bankruptcy of a partner, and in all such cases the banker should stop the firm's account if he wishes to preserve his rights against the estate of the partner who is dead, retired, or bankrupt. If the partnership is continued by the surviving partners, they should be required to open a new account through which all subsequent transactions should be passed.

If the dissolution is by death, the credit balance on the firm's account is by right of survivorship vested in the remaining partners, who can give the banker a valid discharge for the balance outstanding. The remaining partners are also entitled to the credit balance in the event of the bankruptcy or retirement of a partner, but they are liable to the personal representatives of the deceased in the case of death, or to the trustee in the case of bankruptcy, or to the partner himself in the case of retirement, for that portion of the assets of the firm which belongs to the outgoing partner by reason of his interest in the partnership. In no circumstances, however, has an outgoing partner in the case of a retirement, or the personal representative of a deceased partner, or the trustee of a bankrupt partner, power to bind the remaining partners or the firm by any actions in its name.



Any cheques drawn on the firm's account by a deceased partner may be paid by the banker unless there are special circumstances which warrant their return marked "Partner deceased", as, for example, the fact that the account has been stopped by the banker in order to safeguard his rights against the deceased partner's estate. Cheques drawn by a bankrupt or retired partner may be paid if they are dated before the bankruptcy or retirement, although it may be advisable to obtain confirmation of the other partners before payment is actually made.

On the dissolution of a firm by the happening of any of the events referred to, the remaining partners have authority to bind the firm and continue its business so far as may be necessary for the winding up of the partnership affairs and the completion of transactions begun but unfinished at the date of the dissolution. For this purpose the remaining partners may sell or pledge the partnership property, draw and indorse cheques, draw, indorse and accept bills, and perform other acts which are necessary for the proper winding up of the firm's business.

If the partnership account is not stopped in the manner indicated on the happening of one of the events mentioned, any payments to the credit of an overdrawn account after the happening of the event will have the effect of reducing *pro tanto* the liability of the old firm, by reason of the operation of the Rule in Clayton's case (see *ante*, page 169). Furthermore, the banker cannot hold liable the estate of a deceased or bankrupt partner in respect of debts or obligations created by the partnership after the date of death or bankruptcy, but a retiring partner may be held liable for obligations incurred after his retirement, unless notice of the retirement has previously been given.

If a guarantee or other security of a third party is held by the banker in respect of an overdraft on a partnership account, the liability of the third party in respect of the advance will be reduced by every payment to the firm's credit after the happening of any event which is a ground for dissolution, unless the account is *broken*, i.e., stopped, and a new account opened for the purposes of the surviving partners.

On the death, bankruptcy or retirement of a partner, the banker should take a fresh mandate from the surviving partners in regard to operations on the new account, and, if he holds any securities or guarantees on behalf of the firm, he should have all the documents freshly executed by the continuing partners so that their liability may be clearly retained and the liability of the outgoing partner's estate clearly freed so far as future transactions are concerned. Similar steps should be taken in the event of a change in the constitution of the firm occasioned by the admission of a new partner.

The insanity of a partner does not necessarily involve the

dissolution of the firm, but, on application by another partner, the Court may decree a dissolution if the insane person is found lunatic by inquisition or shown to the satisfaction of the Court to be permanently of unsound mind. From a banker's point of view it is desirable that such a dissolution should be effected, otherwise he may be involved in difficulties by reason of the issue of cheques or by other activities of the partner suffering from the mental derangement.

If, after a dissolution, or after a change in the constitution of a firm, the new partners decide to continue its business, the banker should carefully determine as far as possible how the business and the capital of the firm will be affected by the change. Thus the retirement of a partner may involve the immediate withdrawal of his capital, with the possible result that the surviving partners will be short of funds for the requirements of the business, and may be compelled to resort to borrowing from the banker or from some other source. Again, the future prospects of a business may be seriously affected by the death or retirement of a partner who, by virtue either of established reputation, wealthy connections, or special skill, may have contributed materially to its success.

### **Bankruptcy of a Partnership.**

The bankruptcy of a partnership as such involves the bankruptcy of every member of the firm, and necessitates the stopping of all accounts in the name of the partnership or in the names of any of the individual partners.

If a debt is due to the banker on the firm's account and also on the private account or accounts of a partner or partners, he must prove for the *private* debts against the individual estates, and for the *firm's* debt against the joint estate. As stated in Chapter 8, the partnership assets are first applied in payment of the joint debts, and the private assets of each partner are applied, first of all, in payment of his private debts. Any surplus from the estate of the firm is distributed amongst the private estates of the partners according to each partner's interest, while any surplus on the separate estate is transferred to the joint estate for division amongst the firm's creditors. After satisfaction of all outside creditors, the residue from the partnership estate is applied first in paying each partner what is due to him in respect of loans to the firm; secondly, in paying to each partner what is due to him in respect of capital, the remainder being divided amongst the partners in the proportion in which they share profits.

If the banker is secured by the terms of a joint and several mandate or by a joint and several guarantee, he may claim against the joint estate of the firm or against the individual estates of each partner, although he cannot recover in total more than

is due to him on all accounts. If the banker holds security deposited by one of the partners in respect of the firm's overdraft, he may treat that security as *collateral*, i.e., he may claim against the firm's estate in respect of the whole of the debt due to him on the partnership account without, first of all, valuing his security and deducting that value from the amount of his debt. On the other hand, if he holds security deposited by the firm to cover a private overdraft of one of the partners, he can claim against the estate of the partner concerned for the full amount of his debt without, first of all, valuing his security. Again, security which is held to cover a partner's private overdraft as well as a debt due by the firm, may be held by the banker as collateral to whichever debt he pleases, so that he may retain his right to claim in respect of the *whole* of the other debt against the estate concerned.

Any person who is accustomed to transact business with a partnership is entitled to receive notice of any change in its constitution, and in the absence of such notice, he is entitled to hold liable any person who may have retired from the partnership. Such notice may be given in any way so long as it is communicated to the person concerned, and in the case of persons who have had no previous dealings with the firm a notice in the *Gazette* is sufficient.

Like any other person transacting business with a partnership, a banker is entitled to hold liable any person who by his acts gives the impression that he is a partner in the firm, i.e., holds himself out to be a partner or knowingly allows himself to be held out as a partner, and, in the event of the bankruptcy of the firm, that person may be sued for the partnership debts created on the strength of his holding himself out to be a partner as if, in fact, he had been a partner.

On the other hand, a new partner who is admitted into the firm cannot be held liable for the debts of the firm incurred before his admission, unless he has specifically agreed to accept liability for past, present and future debts of the partnership.

### **The Accounts of Limited Partnerships.**

The conduct of accounts of limited partnerships does not differ materially from the conduct of ordinary partnership accounts, but there are two important additions so far as a banker is concerned.

In the first place, a limited partner as such has no power to take part in the management of the partnership business, although he may inspect the firm's books and advise upon the state and prospects of its business, so that while he is not entitled to draw or indorse cheques for the firm's account, he is nevertheless entitled to demand information from the banker concerning the state of the account. If, however, such information is demanded

a banker will be well advised to consult the general partners before acceding to the request.

Secondly, it must be remembered that a limited partner is not liable for any debts or liabilities of the firm when once his share of the capital has been contributed. Care must therefore be taken by a banker to ensure that he is not granting accommodation to a firm on the strength of the wealth or reputation of a person who is merely a limited partner, for such a person cannot be held liable for any liabilities or obligations of the firm so long as he takes no part in its management and does not interfere in its affairs.

## CHAPTER 21

### THE ACCOUNTS OF IMPERSONAL CUSTOMERS

SPECIAL care is needed by the banker in dealing with the accounts of companies, societies, and corporations grouped together as "impersonal" customers, by reason of the fact that their powers to contract and to transact business are strictly controlled by the law under which they are constituted. It is no defence on the part of a banker or any other person to say that he is ignorant of the law, so that, if in the conduct of business with these bodies, he permits them to exceed the powers expressly conferred upon them by statute he may render himself liable to serious loss. Thus it behoves a banker, before entering into business relations with any of the bodies referred to in the following paragraphs, to make himself thoroughly acquainted with the statute governing their constitution and with any rules which may affect the conduct of their affairs.

#### The Accounts of Joint Stock Companies.

As has been previously pointed out, the most common and most important type of impersonal customer with which the banker has to deal is the joint-stock company, the constitution and powers of which are briefly reviewed in Chapter 9, *ante*.

As a rule, the first step in connection with the opening of the banking account of a limited company is taken by the Board of Directors, which passes a resolution to the effect that the account of the company shall be opened at a certain bank, and in accordance therewith the secretary is authorised to supply the bank with the necessary particulars regarding the company's constitution and powers. This resolution is usually embodied in a mandate addressed to the banker, in the form shown on the next page, and, as will be observed, is forwarded to him with (a) the company's Certificate of Incorporation for inspection and return; (b) copies of the company's Memorandum and Articles of Association for the banker's information and retention; (c) the company's Certificate to Commence Business for inspection and return; (d) a copy of the certified resolution of the Board of Directors authorising the opening of the account, together with specimen signatures of the persons authorised to sign on the company's behalf; (e) the company's balance sheet, certified if possible by its auditors. The Certificate to Commence Business is not needed in the case of a *private* company, but is essential in

## To The Northern Bank Limited

3rd June, 19..

GENTLEMEN,

(Name of Company) *The Northtown Cotton Co., Ltd.*

(Registered Office) *New Street, Northtown.*

My Directors request you to open an Account with the above-named Company. In pursuance of this request I hand you herewith—

1. Certificate of Incorporation (for inspection and return).
2. Copy of the Memorandum and Articles of Association.
3. Certificate to commence business.

[This is not required in the case of a Private Company.]

4. Certified Copy of a Resolution of the Board of Directors regulating the conduct of the Account.
5. I also append the signatures of the Directors and other signing officials of the Company.

Yours faithfully,

*James Price, Secretary.*

### THE NORTHTOWN COTTON CO., LTD.

We hereby certify that the following Resolution of the Board of Directors of the *Northtown Cotton Company Limited*, was passed at a meeting of the Board held on the *1st June, 19..*, and has been duly recorded in the Minute Book of the said Company :—

Insert whether  
Head Office or  
Name of Branch.

Insert by how  
many Directors  
and Secretary  
or otherwise.

“Resolved :—That a Banking Account for the Company be opened with the *Northern Bank Limited*, at their *Northtown Branch* and that the said Bank be and is hereby empowered to honour Cheques, Bills of Exchange, and Promissory Notes drawn, accepted, or made on behalf of the Company by *two Directors and the Secretary for the time being, whether the banking account or accounts of this Company are overdrawn by the payment therefor in credit, or otherwise, and to act on any instructions so given relating to the account or transactions of the Company.*”

*T. Brown, Chairman.*

*James Price, Secretary.*

#### DIRECTORS' NAMES.

*Thomas Brown.*  
*William Jones.*  
*Henry Williams.*  
*Samuel Thomas Wright.*  
*Harold Ridyard.*  
*James Johnston.*  
*Henry Black.*

#### USUAL SIGNATURE.

*T. Brown.*  
*Wm. Jones.*  
*H. Williams.*  
*S. T. Wright.*  
*H. Ridyard.*  
*J. Johnston.*  
*H. Black.*

#### Names in Full and designations of Signing Officials.

*James Price, Secretary.*  
*Matthew Whitehead, Accountant.*

#### Specimens of Signatures.

*James Price.*  
*M. Whitehead.*

the case of a *public* company registered after 31st December, 1900. Before the issue of this certificate a public company cannot commence business or borrow money, while any contract formed by such a company before the issue of the certificate is provisional only, and is not binding on the company unless the certificate is afterwards issued.

It is essential to distinguish clearly between this Certificate to Commence Business and the company's Certificate of Incorporation. The latter is, of course, issued in respect of *every* company, public or private, and is unassailable evidence of the right of the persons forming the company to hold themselves out as a legal entity and to operate as such. This certificate and the Certificate to Commence Business, where it applies, should be carefully inspected by the banker so that he may be assured that the company has complied with the regulations of the Companies Acts and is properly entitled to embark upon its operations, including, of course, the opening of its banking account.

The Memorandum and Articles of Association are retained by the banker, who should carefully peruse them to ascertain the nature of the business and the extent of the powers of the company. In particular he should acquaint himself from the Memorandum with the company's powers to borrow money, to invest or lend its funds, to mortgage its property and give security, and whether it has taken power to give guarantees. The Articles are subsidiary to the Memorandum, but from them the banker should ascertain the rights vested in the directors to exercise the powers of the company as defined in the Memorandum. He should notice especially the regulations governing the execution and indorsement of contracts, deeds, bills of exchange, promissory notes, and cheques, ascertain how the banking account is to be conducted, whether or not all acts of the directors must be done at a board meeting, and whether power is given to them to delegate their authority, and if so, to what extent. He should also assure himself that the mandate signed on the company's behalf by its officials does not exceed any provisions contained in the Memorandum or Articles, for any acts of the officials which are outside the powers conferred by these documents will be *ultra vires*, i.e., beyond the powers of the company and not binding upon it. If the banker is doubtful upon any material point, he should take the advice of a solicitor thereon.

If the company requires an overdraft, the banker should require, in addition to the foregoing, a copy of the resolution of the directors authorising the overdraft and sanctioning the deposit and signing of the security which it is proposed to give the bank. In addition he should determine whether such a resolution is permissible under the terms of the Memorandum and Articles, for such documents may empower the directors to borrow money but not to pledge as security any property of the company, or they may provide that the company can borrow and give security

*only* by the resolution of its shareholders in general meeting. The documents should be searched also to ascertain whether they limit the company's borrowing powers to a certain fixed amount, for if any limit so specified is exceeded by the directors, or, if the directors borrow although the company itself has taken no powers to borrow, then the borrowing will be *ultra vires* the company and void. As a result, the banker will be unable to enforce his rights against the company itself, although he may hold the directors personally liable for a breach of implied warranty of their authority, provided that he acted in good faith and without knowledge of the absence of authority. On the other hand, if the borrowing is not in excess of the powers of the company as contained in its Memorandum, but has exceeded the powers of the directors as given by the Articles, the company may by special resolution ratify the act of borrowing, and so make itself liable to repay the advance.

In certain cases, however, where from a perusal of the Articles it would not be possible for the banker to discover that the directors have exceeded their powers, the company will be bound even in the absence of ratification. Thus in *Royal British Bank v. Turquand*, 1856, the directors of a company were given power by the Articles to borrow and pledge property of the company *provided* a resolution of the shareholders in general meeting was first passed. The directors borrowed money from the bank but no resolution was passed. It was held that the company was bound, for although the bank was deemed to have notice of the restriction in the Articles, it was not bound to inquire into the internal affairs of the company, and, in the absence of express notice to the contrary, was entitled to assume that the necessary resolution had been passed.

In any case, if the borrowing powers are exceeded and the banker cannot recover from the company, he may proceed against the directors as mentioned or obtain full or partial repayment by exercising his right of *subrogation*, by virtue of which he is entitled to "stand in the shoes" of those whose debts have been paid with the money borrowed from him. In other words, if the money borrowed from him has been used to pay creditors of the company, he may assume the rights of those creditors and sue the company for the amount of the debts which have been paid.

In the case of a *non-trading* company, express powers to borrow and pledge its property must be included in the Memorandum, otherwise the company cannot exercise any such powers even to the extent of discounting bills of exchange. On the other hand, a *trading* company has implied powers to borrow and to pledge its property to such an extent as is reasonably necessary for the carrying out of its legal objects, even if such powers are not explicitly mentioned in its Memorandum or Articles.



The borrowing powers may be exercised in any manner which the directors think fit, as by overdraft on current account, by special loan account, by legal or equitable mortgage over specific assets of the company, by debentures or bonds, or by the giving of a floating charge over the general assets of the company; but uncalled capital cannot be charged in the absence of express provision in the Articles.

Apart from thus investigating the powers of the company so far as it may affect its banking account, the banker is not concerned with any regulations governing the internal management of the company, nor is it his business to see that money borrowed from him is applied for any specific purpose or object. But the debit balance should never be allowed to exceed the limit imposed on the company's borrowing powers by its Memorandum.

In view of the express provisions in the Bills of Exchange Act and Companies Acts (see *ante*, page 222) as to how negotiable instruments and other documents shall be executed on behalf of a company, it is clearly in the banker's own interests to ensure that all cheques, bills, and other documents with which he is concerned are properly signed on the company's behalf in accordance with the provisions referred to. This applies particularly to all mortgages or charges given by the company as security for advances granted by him to the company.

Apart from ensuring that all mortgages and charges given as security are properly executed on the company's behalf, it is imperative that the banker should see that such mortgages and charges are duly registered with the registrar in accordance with the regulations referred to on page 145, *ante*, otherwise any such charge which is unregistered will be void as a security against a liquidator and any creditor of the company, the money secured by the charge ranking only as an unsecured debt in the event of a winding up. If, therefore, the necessary registration is not effected by the company, the banker should himself take steps to register the charge, and may recover from the company any fees thereby incurred, as, for example, by debiting the amount paid to its account.

From Section 93 of the Companies (Consolidation) Act, quoted on page 146, it will be observed that whereas the mere deposit of title-deeds as security for an advance, with or without a memorandum of charge, requires registration as a charge *on land* of the company, registration is not required in the case of the deposit of a negotiable instrument or shares and debentures in another company as security for liabilities of the company obtaining the advance. On the other hand, *in the company's own Register of Mortgages and Charges*, kept at its registered office, must be noted particulars of all mortgages and charges *specifically* affecting its property. Accordingly this register must contain particulars of *all* charges other than floating charges (see page 146, *ante*), and must therefore include details of all charges created by the com-

pany by the deposit of negotiable instruments, shares, debentures, title-deeds, documents of title, or other choses in action.

### Debentures as Security for Advances.

Considerable care is necessary on the part of a banker in taking from a company a registered or bearer debenture as security for its overdraft. If such a document is to be accepted, the banker should first of all ascertain from the company's Memorandum or Articles whether the issue of the debenture and the amount of the proposed loan are within the powers of the company and its officials. Furthermore, he should inspect the company's Register of Mortgages and Charges, and also the register kept by the Registrar of Joint-stock Companies, with a view to ascertaining whether any debentures or debenture stock have already been issued by the company, and, if so, whether they have given a specific or floating charge over its property. If a prior specific charge exists over the property to be charged to the banker, his security will be postponed to that of the original mortgagee and will be to that extent less valuable. On the other hand, if a prior floating charge has been given, the banker will, as a rule, be safe in accepting a specific charge over certain of the company's property, and, *provided* he has no notice of any stipulation in the prior charge prohibiting the company from creating a subsequent charge or mortgage on its property to rank either in priority or *pari passu* with the existing charge, his specific security will take priority over the previous floating security. On the other hand, if the banker has notice of the existence of such a condition in a prior instrument of charge, he cannot obtain priority even by taking a specific charge where only a floating charge exists.

As a rule, the instrument creating the charge will be in the names of the bank's nominees, and is preferably made payable upon demand. Where the instrument gives the banker a floating charge over the company's property or a specific charge over certain of its assets, it should be registered within twenty-one days of its execution with the Registrar of Joint-stock Companies, and if it creates a specific charge, it must be registered also in the register kept at the company's office. The debenture should provide that the company shall not create any further charge over its general assets (or over the specific assets, as the case may be) which shall rank *pari passu* with, or in priority to the banker's charge, and, in the case of a specific charge, the instrument should be accompanied by the deeds or other documents evidencing the company's title to the property concerned, so that the company will be prevented from giving the deeds or other documents as security to any person who has no knowledge of the existence of the debenture.

A debenture, whether specific or not, should be accompanied

by the bank's usual memorandum of deposit, and should state the purpose of the deposit, contain particulars of the property specifically charged, if any, and provide that the charge is not to be regarded as having been redeemed by reason only that the company's account has ceased to be in debit during the continuance of the charge. In addition, the memorandum will usually give the banker power to appoint a receiver or manager of the company's property in respect of any debt which may be due by the company to the bank, but, if such power is exercised, the banker will incur a heavy penalty if he does not give notice of the fact to the Registrar of Joint-stock Companies, who, on payment of a prescribed fee, will enter the fact on the Register of Mortgages and Charges.

### Floating Charges as Security.

If the charge created by the debenture is a floating charge, the provisions of Section 212 of the Companies (Consolidation) Act, 1908, are of particular importance. By that section it is provided that any floating charge on the undertaking or property of a company created within three months of the commencement of its winding up shall, *unless* it is proved that the company was solvent immediately after the creation of the charge, be invalid, except to the amount of any cash paid to the company at the time of or subsequent to the creation of the charge and in consideration therefor, together with interest on that amount at 5 per cent. per annum. Thus in the case *In re Hayman, Christy and Lilly, Ltd.*, 1917, where an insolvent company within three months of its winding up issued debentures to a bank as security for an existing loan and for future advances on current account, it was held that, under Section 212, the debentures so far as issued as security for the *past* debt on the loan account were invalid, and so far as issued as security for *future* advances on the current account were valid only to the extent of the amount owing on the current account at the commencement of the winding up.

An important defect of a floating charge to which a banker must be alive is that he is not entirely secure, even if he obtains judgment against the company and execution is issued on his behalf to obtain satisfaction of the debt, for the rights of an execution creditor are *subject to all equities*, i.e., subject to any prior legal claims against the property, so that even if the property is seized on his behalf he cannot take precedence of the rights of debenture holders who have a *specific* charge over the property seized. Moreover, any *preferential* creditors of the company (i.e., creditors for rates, taxes, wages of servants and workmen, or for money due under the Workmen's Compensation Acts) must be paid in full before creditors secured by a floating charge are entitled to claim upon their security.

Considerable care must be exercised by a banker in his dealings with a company when he receives notice that it has made an issue of debentures or debenture stock, particularly if he has an *unsecured* overdraft on current account, for in such a case the debentures may give a charge over the company's assets which would take priority over the claims of unsecured creditors (such as the banker) in the event of the company's liquidation. In such circumstances, the banker's best course is either to insist upon an immediate reduction of the company's indebtedness, or to require the directors to charge some specific property of the company to the bank as security for the advance.

### The Winding-up of a Company Customer.

As is pointed out in Chapter 9, the existence of a company is terminated by its winding up or liquidation, during which its assets are realised and the proceeds applied in payment of its debts, the surplus, if any, being distributed amongst the creditors. As soon as he receives notice of the commencement of the voluntary or compulsory liquidation of a company-customer, the banker should at once stop the relative account, and hold any credit balance thereon at the disposal of the liquidator, who has power to operate the account in accordance with the regulations referred to on page 112, *ante*. If the account is overdrawn he must take the necessary steps to obtain repayment. Thus, if he is *unsecured* he will, of course, prove for the whole of the debt and charges due to him, but if he is *secured* he may either (a) rely on his security and not prove; (b) realise his security and prove for the balance; (c) surrender his security and prove for the whole debt; or (e) assess the value of his security and prove for the balance, subject in the latter case to the liquidator's right to redeem the security on payment of the assessed value.

In regard to the payment of a company's cheques after the commencement of a compulsory winding up, the banker's position is similar to that in the case of the bankruptcy of a private individual. A compulsory liquidation is deemed to commence at the date of the presentment of the necessary petition. From that date the power of the directors to draw cheques on the company's account is determined, and the banker cannot debit to the account cheques paid by him after the date of the petition, even though he has no notice of its presentment. Accordingly, a banker's only safeguard, apart from maintaining a regular search of the *Gazette*, is to exercise extreme care if he has any suspicion that the affairs of the company are not as financially sound as they might be.

As a voluntary liquidation is commenced by resolution of the company in general meeting, followed by a statutory advertisement in the *Gazette*, a banker is rarely without due notice

of the commencement of such a winding up; while, as conditions in a voluntary winding up are not as exacting as in the case of a compulsory liquidation, it is likely that a banker will be permitted to debit the company with cheques properly paid by him even after receipt of notice of its intention to wind up voluntarily.

### The Accounts of Non-trading Corporations.

*Non-trading* corporations, such as railway companies, electric lighting companies, and water companies (referred to in Chapter 9), have no power to borrow money or to pledge their property as security unless such powers are conferred upon them by the statute under which they are formed, nor, in the absence of express powers, can they draw or accept bills of exchange or make promissory notes, although presumably such corporations can draw and indorse cheques on a banking account properly conducted for the purpose of making and receiving payments. Accordingly, on opening an account for any such corporation the banker should safeguard himself by a careful investigation of its powers in relation to banking operations generally, and in no circumstances should he grant an overdraft unless the company is entitled to borrow. If, in the absence of such powers, the banker grants an overdraft, or grants an overdraft in excess of any limit which may be imposed by the corporation's constitution, the loan will be *ultra vires*, and the banker will have to rely on his right of *subrogation*, i.e., on his right to stand as a creditor of the corporation so far as its legal debts and liabilities have been paid out of the money advanced. But the burden of proving the application of the monies in satisfaction of the company's legal debts will rest on the banker, who in seeking to enforce his rights will be unable to avail himself of the Rule in Clayton's Case. In other words, if a non-trading corporation borrows money *ultra vires*, the lender is entitled to repayment of his advance only in so far as he is subrogated to rights of creditors of the corporation whose debts have been paid by means of the money advanced, but this does not entitle him to any securities or priorities of the creditors who have been paid.

### The Accounts of Building and Friendly Societies.

Before opening accounts for a building society or friendly society, a banker should take a mandate in the form shown on page 564, embodying a resolution of the governing body of the society appointing the bank as its bankers, and containing also precise instructions as to the signing and indorsing of all negotiable instruments on behalf of the society, with specimen signatures of the officials authorised to sign on its behalf. Before acting on the mandate, the banker should satisfy himself that the instructions given are in accordance with the registered rules of

the society, a copy of which should be obtained and filed for future reference.

The accounts should be opened in the full name of the society, the address of its registered office being given in the ledger heading, and a note added specifying the names of the principal officials.

Considerable care is necessary in granting an overdraft to societies of the type here discussed, for their powers of borrowing and pledging property are strictly regulated by their rules and the statute under which they are constituted (see Chapter 9). Before making an advance, therefore, the banker should ascertain from the rules whether the society has any powers to borrow, whether there is any limit to such powers, precisely how the powers are to be exercised and how the loans are to be secured. In the case of a building society, he must also ensure that the total amount borrowed by the society, including the amount advanced by him and borrowed by the society from its members, does not at any time exceed the limits imposed by Section 15 of the *Building Societies Act, 1874*. (See *ante*, page 153.) Moreover, in order that he can readily ascertain at any time how much is advanced to a building society, the banker should arrange for the loan to such a society to be taken on a separate loan account, which should be kept quite distinct from the current account, and the latter always kept in credit.

If such precautions are not taken, the banker will run the risk of being unable to recover from the society any money borrowed by its officials in excess of the limit imposed either by its rules or by the Act under which it is constituted.

Cheques issued by a society registered under the *Friendly Societies Acts, 1896 and 1908*, are exempt from stamp duty, but before permitting a society to use unstamped cheques, the banker should satisfy himself that it is in fact entitled to the exemption.

The banker should take steps to ensure that he is notified immediately of any change in the officials of the society, or of any change in the arrangements made concerning the signing of cheques, such as may be occasioned, for example, by the death or retirement of one of the persons authorised to operate on the account. Furthermore, if he receives notice of the death or retirement of a person authorised to sign on behalf of the society, he should take steps to stop the account pending the appointment of a new official, subject to his right to pay any cheques drawn before the receipt by him of the notice.

### **The Accounts of Industrial and Provident Societies:**

The conduct of accounts with industrial and provident societies should be governed by the general principles laid down in the foregoing paragraphs. These societies also are governed by rules which must be duly registered, and usually set forth the

method in which the society's statutory powers to borrow are to be exercised, the nature of the security which may be given, and the limit to the amount which may be raised by its officials. Clearly, a banker granting accommodation to societies of this kind must make himself thoroughly acquainted with the powers conferred by its rules, and should require a mandate similar to that obtained in the case of a building society.

### **The Accounts of Trade Unions.**

Here, again, the general principles governing the conduct of the accounts of a friendly society will apply. The Rules of the union must be investigated in order to ascertain the powers of its officials and the authority, if any, given to its trustees to borrow money for purposes of the union. The account of a trade union must be opened in the name of its properly appointed trustees, all of whom should be required to sign cheques and other instruments. If an advance is granted, the personal security of the trustees should be obtained in the form of a joint and several guarantee, although, as is pointed out in Chapter 9, the trustees have a limited power to borrow against a mortgage of real or leasehold property of the union.

The cheques of a registered trade union are not exempt from stamp duty.

### **The Accounts of Informally Constituted Bodies: Clubs, Committees, and Associations.**

Included under this heading are accounts opened in the names of associations of various kinds formed for charitable, literary, religious, political, or sports purposes, such as are mentioned in Chapter 9. Such accounts are to be distinguished from those opened in the names of private customers with an indication in the heading that the account relates to some club, association, or society, as, for example, an account headed "Thomas Robinson, re Northtown Charity Club", or "Thomas Robinson, a/c Northtown Football Association". Accounts of this type may be treated as ordinary personal accounts, subject to the fact that the bank must be deemed to have notice of the fiduciary character of the funds.

If the account is opened, as is usual, in the name of the association, society, etc., the banker should require a mandate similar to that on the following page, embodying a resolution of the association, or of its committee or council, appointing the bank as bankers of the association, and including instructions as to how cheques are to be signed, with specimen signatures of the persons authorised to operate. The mandate should be duly authenticated by the signature of the chairman of the meeting at which the resolution is passed, and by the signatures of the officials of the association.

**Mandate for the Accounts of Informally Constituted Bodies  
(Literary Societies, Clubs, etc.)**

\* Committee of Management or as the case may be.

† Name of Club or Society.

‡ Quote Number

§ Committee or Club or as the case may be.

¶ Full Name of Club or Society.

‡ " Club " or " Society " or as the case may be.

At a Meeting of the \* *Committee of Management* of the † *Northtown Dramatic Society*, duly convened and held at 50 *New Street, Northtown*, on the 1st day of *June 19..*, at which Meeting there were present ‡ *six* Members of the said <sup>1</sup> *Committee*,

### It was Resolved—

That *NORTHERN BANK, LIMITED*, be, and they are hereby, authorised to pay all Cheques drawn upon any account or accounts for the time being kept with the said Bank, in the name of the § *Northtown Dramatic Society*, when signed by *any two members of the Committee and the Secretary for the time being*, whether such account or accounts are overdrawn by the payment thereof or are in credit or otherwise, and that all documents requiring the endorsement of the said <sup>2</sup> *Society* may be endorsed on its behalf by *the Secretary for the time being*, and that all receipts for the delivery of securities and vouchers, etc., may be signed by *any two members of the Committee and the Secretary for the time being*.

(Signed) *James Price*,  
Secretary.

(Signed) *Thomas Brown*,  
Chairman.

#### NAMES IN FULL.

*Thomas Robinson.*  
*William Black.*  
*Henry Robbins.*  
*Martin Davies.*  
*Richard Thomas Brown.*  
*Albert Dunning.*

#### SPECIMENS OF SIGNATURES.

*T. Robinson.*  
*Wm. Black.*  
*H. Robbins.*  
*M. Davies.*  
*R. T. Brown.*  
*A. Dunning.*

NOTE:—A copy of the Rules of the Society or Club should be obtained and held at the Branch, and this Form should be altered, if necessary, to comply with the said rules.

As a rule, the accounts of the bodies here referred to are maintained in credit, but if an overdraft is required, considerable care must be exercised by the banker in fixing the responsibility for the advance; for, as is indicated in Chapter 9, associations of this kind have no legal entity and cannot be sued in respect of any liabilities incurred by their officials. Furthermore, the officials or other persons who are deputed to sign cheques on the association's account cannot be held individually liable for any advance which may be created, if in signing they clearly indicate that they are acting on behalf of the association. Consequently, a banker should not permit an overdraft on an account of this nature unless he secures a guarantee from an individual of sound financial standing, or a joint and several guarantee from two or more reliable parties.

As in the case of building and friendly societies, the banker should arrange to be notified at once of any change in the officials of the society or in the authority of any persons deputed to act on its behalf. Upon the death or retirement of a signatory, the account should be stopped, subject to the banker's right to pay cheques drawn before the receipt of notice of the event in question.



The account need not, however, be stopped in such circumstances if the mandate authorises signature on behalf of the society by any one of two or several persons, provided that all cheques paid by the banker subsequent to receipt of notice of the retirement or withdrawal do not bear the signature of any person who has so retired or withdrawn. Nevertheless, it is best in all such circumstances to obtain an entirely new mandate empowering the remaining persons to act with any new person who may be appointed to fill the vacancy.

It is scarcely necessary to add that the personal representatives of a deceased signatory to such an account have usually no power to interfere with the conduct of the account or with the affairs of the society concerned.

### **The Accounts of Local Authorities.**

In view of the considerations enumerated in Chapter 9, it will be clear that the banker may be involved in considerable difficulty in respect of accounts of local authorities, unless he safeguards himself by becoming thoroughly acquainted with the object for which they are constituted and the powers conferred upon them by the regulating statute.

It must be remembered that local authorities are really trustees for the public, whose interests they are required to protect. The funds which they control are trust funds, and as the banker is presumed to know this, he must exercise in connection with local authority accounts as great a degree of care as he would exercise in the case of any other form of trust account. Hence if he permits a transfer from the account of a local authority in reduction of the private overdraft of a signing official, he will run the risk of incurring liability as a party to a breach of trust.

In the majority of cases, the account of a local authority is opened in the name of a treasurer, who is usually the manager of the branch at which the account of the authority is kept, but in larger towns there may be a specially appointed official. An account thus opened in the name of a treasurer is regarded as existing between the treasurer and the local authority, and not between the local authority and the bank, for apparently a joint-stock bank is not permitted, except in special cases, to act as treasurer for such an authority. Accordingly, the heading on the ledger account and in the pass book should be worded somewhat as follows: "Thomas Robinson, Esq., Treasurer to the Northtown Urban District Council", or "Thomas Robinson, Esq., Treasurer to the Mayor, Aldermen, and Burgesses of the Borough of Southtown", and so on. Separate accounts must be opened in respect of each separate undertaking of the authority, and the respective balances and operations thereon must be regarded as entirely distinct for all purposes. Thus if an authority has

a number of accounts headed "General Account", "Water Account", "Tramways Account", etc., the accounts must be kept quite distinct both by the authority and the bank, all cheques and credit slips being properly marked to indicate the account to which they refer. In no circumstances can a banker exercise any right of set-off in connection with separate accounts of this nature.

Upon opening an account for a local authority the banker should obtain a properly authenticated resolution of the authority appointing the treasurer, embodying precise instructions as to how cheques and other negotiable instruments are to be signed, and accompanied by specimen signatures of those deputed to act on its behalf. As a rule, the mandate will be given under the common seal of the authority, and will provide that all cheques must be signed by three members of the council, and countersigned by the clerk or other person approved by the council. If a mandate is not thus given for certain persons to sign on behalf of the authority, it is usually arranged for the treasurer to be periodically furnished with a schedule of payments to be made by him to specified persons, the schedule being authenticated by the signatures of three members of the Council or Finance Committee, and countersigned by the clerk.

With the exception of cheques drawn by Guardians of the Poor, all orders for payment issued by local authorities must be stamped, so that a schedule given to the treasurer in the manner supplied requires stamping with a twopenny stamp, and a similar stamp is necessary on each advice sent to creditors of the authority informing them that payment of their accounts will be made on application to the Treasurer.

As has been previously pointed out (see page 474, *ante*), the orders for payment of a local authority being drawn upon its treasurer and not on a bank, are not cheques within the meaning of the Bills of Exchange Act, 1882. Accordingly, the treasurer obtains no protection under Sections 60 and 80 of the Bills of Exchange Act, or under Section 19 of the Stamp Act, 1853, unless he can show that he does in fact act as banker to the authority at their express request, in which case he may be protected by Section 19 of the Stamp Act if the instrument can be regarded as properly payable on demand, and by Section 80 of the Bills of Exchange Act, as extended by Section 17 of the Revenue Act, 1883, if the instrument is crossed and paid in accordance with the crossing. Similarly, the collecting banker will be protected by Section 17 of the Revenue Act, if he can bring himself within its provisions, but both the paying banker and collecting banker will lose the protection if the instrument dealt with bears evidence of having been transferred.

The position of the paying banker in regard to these documents, however, is very unsatisfactory, and it is usual therefore for the bank to obtain from the authority an undertaking to

indemnify them against any loss which they may sustain by the payment of such conditional instruments.

As a rule, little difficulty should arise in the conduct of accounts with a local authority if the accounts are maintained in credit ; but extreme care is necessary if the authority requires an overdraft from the bank, either for general purposes or for any or some of its undertakings. Apart from express provision in the statute or statutes under which the authority is constituted, it has no legal power to borrow or to give security ; and, as is indicated in Chapter 9, even where such power is given, the regulations concerned must be obeyed to the letter in respect of the method of obtaining the advance, giving security, and applying the money, otherwise the loan will be illegal, and the lender unable to enforce repayment. Consequently, before granting an overdraft to a local authority, a banker must for his own protection determine whether the authority has statutory power to borrow, in what way and against what security the loans may be obtained, whether any limits are imposed, and whether the sanction of the controlling government department is necessary. Having ascertained that the advance may be safely granted, the banker should as far as possible safeguard himself by seeing that the money borrowed is applied for the purpose for which it was ostensibly obtained.

If an illegal advance is granted, apparently the banker's only remedy is that he may in certain circumstances be subrogated to the rights of creditors whose claims have been satisfied with the money borrowed from him, that is to say, he may claim to succeed to the rights against the authority of the creditors who have been paid out of the money advanced by him. Usually, however, this right is quite an illusory one, for a local authority which had applied money illegally borrowed could raise the necessary funds to repay the banker only by levying a rate, which, in the circumstances, it would probably be unable to do, as a rate cannot legally be levied to meet expenditure incurred more than six months prior to the date of the levy.

Upon the death, retirement, or removal to another town of its treasurer, the local authority usually proceeds by resolution in general meeting to appoint a new treasurer, who will usually, although not always, be the new manager at the branch where the account is kept. If such is the case no further action is necessary than to obtain a copy of the resolution, and effect the necessary changes in the headings of the relative accounts and pass books. In such circumstances it is not usually necessary to close the old accounts and open new ones, the mere alteration of the heading with the date of the change being considered sufficient. If, however, the manager of another bank is appointed treasurer, it becomes necessary to transfer all the accounts and any relative securities to the bank concerned, in which event that bank will be put to the necessity of obtaining a new mandate

and having any documents of charge re-executed in its own favour.

### The Accounts of Overseers.

From the point of view of a banker the accounts of overseers may be regarded as being in the nature of trust accounts, for although overseers are not strictly trustees, the money which passes through their hands and which is placed to their credit is held by them in a fiduciary capacity.

As a rule, accounts of overseers are opened in the same way as ordinary joint accounts, the names of the individual overseers being given and a description added across a ledger heading, as, for example :—

Thomas Robinson, 17 East Street, Northtown, Clerk	} Overseers of the Parish of Northtown.
William Brown, 28 West View, Northtown, Accountant	

Alternatively the account may be opened in impersonal style, as, for example, "The Overseers of the Parish of Northtown", in which case the individual names of the overseers for the time being are shown at the head of the account.

The overseers in each parish are appointed by the parish council, or, in the absence of such a council, by a parish meeting convened in accordance with the Local Government Act, 1894. Before opening the account, the banker should require the overseers to produce some formal evidence of their appointment. Where a parish council exists the authority will usually consist of a letter signed by the chairman, two councillors, and the clerk, but where the overseers are appointed by parish meeting, the authority will consist of a letter signed by the chairman of the meeting and the clerk in attendance.

The banker's usual mandate should be obtained, signed by all the overseers, and indicating whether all or some of them are to sign and indorse cheques. Providing the mandate is thus signed by all the individuals connected with the account, there is no objection to the banker acting on instructions to honour cheques signed by one or some of the number, but he should not accept a mandate which purports to delegate signing authority to any outside person or persons.

When any change takes place in the individuals appointed to act as overseers, the banker should require a new letter of appointment, and obtain a fresh mandate from the new overseers. If the account was opened in the individual names, it will be necessary to close the old account and to obtain a cheque from the retiring overseers transferring the balance to the new account. If, however, the account is opened impersonally, it will be sufficient if a note of the change of overseers is made in the heading of the account, the names of the new overseers being stated together with the date of their appointment.

As a general rule, advances should not be granted to overseers in their official capacity, for they have no power to borrow for the purposes of their office. Sometimes, however, the banker is asked to grant accommodation on these accounts, in order to tide over temporary shortages; but before acceding to such a request he should obtain a joint and several guarantee from all the overseers, so that he can hold them personally liable for the advance. Such a course is desirable even when the account is opened in the individual names of the overseers, for the persons concerned may not appreciate, unless such a guarantee is taken, that they are individually liable for any overdraft which they may create by drawing cheques on the account.

## CHAPTER 22

### CUSTOMERS' SECURITIES FOR ADVANCES

**BANKERS** are sometimes willing to grant advances to customers of good standing without demanding the formal deposit of security to guarantee the repayment of money lent, but it is usual, in the majority of cases where an overdraft is allowed, for the banker to arrange to obtain from the customer some form of security which can be realised if the borrower defaults in making repayment.

The types of security offered to a banker are numerous, and vary considerably according to the nature of his business and according to the neighbourhood in which the business is conducted. Possibly the most common form of security deposited by a customer consists of stock exchange securities, such as share certificates, bearer bonds and share warrants. Securities of this kind usually preponderate in rich residential neighbourhoods, such as the West End of London or high-class seaside resorts. In agricultural centres the principal security offered will take the form of documents of title to land and buildings, while in a busy sea-port town the type of security will consist chiefly of documents of title to goods imported and exported, the nature of the goods to which the documents relate depending, of course, on the class of trade passing through the port.

As we have seen in an earlier chapter, it is to the advantage of a banker's business that his advances should be distributed as widely as possible, and it follows that it is equally desirable that the types of security taken should also be well distributed and varied. In the case of the great joint-stock banks a wide distribution of this kind is almost automatically obtained, whereas it is only natural that banks which cater more especially for the needs of a restricted area should grant a large proportion of their advances against security of the same kind. Thus, the localised banks of Lancashire and Yorkshire have to make a considerable proportion of their advances against the security of mill property, textile raw materials and products, so that they are naturally intimately concerned with the prosperity or depression of the great cotton and woollen industries of those counties.

In any case, whatever the type of security accepted by a banker, he will usually take careful steps to ensure that the advance granted to the customer is at no time in excess of the actual realisable value of the security. Indeed, it is only in

exceptional circumstances that a banker will permit his customer to overdraw to an amount equal to the full realisable value of the security in his hands.

Moreover, in making advances to customers, the banker always keeps well before him the important question of the *quality* of his loans and overdrafts. As is pointed out in Chapter 3, English banks aim at supplying temporary accommodation rather than advances for long periods, i.e., they provide *commercial* rather than *investment* capital. Accordingly, in considering any application for an advance, a banker makes careful enquiries in order to ascertain whether the customer proposes to use the money as floating or liquid capital in his business, or whether he proposes to apply it in the purchase of fixed assets, such as land, buildings, plant or machinery. If the required loan is clearly of the nature of a long period investment, the banker will usually advise the customer, if he is an individual, that the money would be more advantageously raised on mortgage, or in the case of a limited company or corporation, that it would be best obtained by the issue of additional capital or debenture stock.

In addition to investigating the value and effectiveness of the security offered, which matters are dealt with below, the banker will make careful enquiries of the customer as to the purpose for which the loan is required and as to the manner and time in which repayment is to be made. Wherever possible, a balance sheet or a statement of affairs in the form given in Chapter 20 will be obtained from the applicant, and the banker will give the various items careful consideration in order to ascertain whether the proposed advance is likely to be of any benefit to the borrower. Clearly, a banker is likely to derive little advantage by granting accommodation to a person whose liabilities are already in excess of his available assets. In such circumstances a loan would be only a temporary palliative, having the effect merely of postponing the time when the customer will have to realise his assets in order to meet his liabilities. At the same time it should be remembered that the successful lender is more frequently he who is optimistic rather than he who is pessimistic. Unquestionably, bankers stand to gain both in reputation and worth by assuming that reasonable degree of risk which may be necessary in order to accommodate customers who, although temporarily embarrassed, are known to have a sound business, to be of undoubted integrity and to bear an established reputation in the district. Many a manager owes his success to his willingness to undertake a risk which others would not accept; there is probably no surer way of enhancing the local reputation both of the manager himself and of his bank.

On the other hand, it must not be forgotten that modern bankers cannot be expected to accept unreasonable and hazardous risks. Such propositions belong to the sphere of the money-lender rather than the banker, for the former is in a position to

charge a rate of interest which is commensurate with the risk involved, whereas a joint-stock banker is prevented by custom and tradition from charging interest much in excess of the prevailing bank rate. Moreover, such vast sums are nowadays left with the banker on the understanding that they shall be repayable on demand, that a banker cannot afford to accept business which might unduly prejudice the liquidity of his resources. It is chiefly for this reason that security of some kind is required by a banker in respect of the majority of advances granted to his customers.

### Personal and Collateral Security.

The types of security taken by a banker are sometimes divided into two broad classes: (a) *personal* security and (b) *collateral* security. In regard to the former, it must be remembered that a banker who grants an advance to a customer has always a personal right of action against that customer in respect of the debt, but as action against a debtor is a long and tedious process frequently attended by unsatisfactory results, it is usual for the banker to safeguard his position by requiring the deposit of independent security. Technically, the term "personal security" is applied to an undertaking given by the customer, or by some third person on his behalf, as a security for the due repayment of an overdraft, and may take the form of a guarantee under hand or under seal, or a bond under seal, or a properly stamped promissory note. In all such cases the remedy of the banker is a personal one, i.e., if the undertaking is not fulfilled and the money advanced not paid in due course, the banker must take action in the Courts to enforce his rights against the person or persons who have signed the undertaking.

The term "collateral security" has, unfortunately, no strictly defined application. In general, it applies to all types of security other than the personal security referred to in the preceding paragraph, and is taken to mean security which runs parallel to or side by side with the personal right of action which the banker has against a debtor customer in respect of an advance. In this sense the term "collateral security" will apply to share certificates, bearer bonds, title deeds, life policies, etc., which are deposited by the customer to ensure the faithful discharge of his obligation to the banker, and also to a guarantee of a third party given as security for the customer's overdraft.

In its second sense, the term "collateral security" is applied to any of two or more instruments which secure the same debt. Thus, if the account of one customer is secured by two different guarantees the two securities would be described as collateral to each other, or if an account is secured by a guarantee and also by the deposit of documents of title, the two distinct securities would be described as collateral.



In its third sense, the term "collateral security" is applied to security which is deposited by a third party or by third parties to ensure the due repayment of a loan by a customer. In this sense a guarantee signed by a third person to ensure repayment of a customer's advance would be a collateral security. This distinction of security held by a banker as collateral is of particular importance in the event of the bankruptcy of the principal debtor. In such circumstances all securities belonging to the insolvent customer himself must either be sold or valued, and a claim made by the banker against the estate for the outstanding balance. If, however, security is lodged by third parties in respect of the overdraft of an insolvent customer, the banker may regard such security as collateral, i.e., he may for the time being ignore its existence and claim on the debtor's estate for the full amount of the advance. The collateral security can then be realised and applied in payment of any part of the outstanding debtor balance which is not paid off by the dividends or composition received from the bankrupt's estate. For example, suppose two customers A and X are each granted an overdraft of £150, and that A deposits as security bearer bonds valued at £100, whereas X's advance is secured by a guarantee for £100 given by B. If A and X become bankrupt, the banker can prove only for £50 against A's estate, as he must first of all deduct the value of the bearer bonds from the amount of the advance, whereas in X's case he can prove for the whole £150. Consequently, if the dividend in both cases is 10s. in the £1, the banker will lose £25 as against A, whereas, having obtained a dividend of £75 from X's estate, he can claim the balance from the guarantor B and thus obtain payment in full.

There is a further very important aspect of the deposit of security by a third party to ensure repayment of a customer's debt. In all his dealings with the customer, the banker must exercise the greatest care to respect the relationship of principal and surety existing between the customer and the third party. In the absence of an agreement to the contrary, a surety is discharged if the creditor without his knowledge or consent makes a new arrangement with the principal debtor in regard to giving time for the repayment of the advance, or in regard to the amount of the advance, or the period for which it is granted. Furthermore, considerable care must be exercised by the banker to protect himself in case any event occurs which, in the absence of special safeguards, would result in the Rule in Clayton's Case operating in favour of the surety. Thus, the liability of the surety ceases as to any future advances on the death, bankruptcy or insanity of the principal, so that in order to safeguard his rights against the surety the banker must at once stop the relative account on the happening of any of these events. If this is not done, every subsequent payment in to credit of the account concerned will operate to reduce the amount for which the

surety is liable, while every subsequent debit item will create an entirely new advance for which the surety cannot be held liable. Again, if a guarantee is given in respect of a partnership, the contract between the banker and the surety will be changed by any alteration in the constitution of the partnership, such as may arise, for example, on the admission of a new partner or on the death, bankruptcy or retirement of an existing partner. It is, therefore, the invariable practice nowadays for bankers to safeguard themselves by taking from the customer and also from the third party a document in writing clearly setting forth the details of the contract and providing against any of the contingencies referred to above. The more important forms of such documents are described below.

### Formal Security : Pledge and Mortgage.

There are two distinct ways in which a banker can obtain a legal claim to security professedly left with him as cover for an advance ; (a) *by pledge*, and (b) *by mortgage*. The former applies usually to the deposit with the banker of transferable securities such as bills and promissory notes, bonds to bearer and documents of title to goods, whereas the latter applies chiefly in the case of stock and share certificates and deeds of title to land and buildings.

As a rule, a pledge is evidenced by a Memorandum of Deposit or a Memorandum of Charge, which gives particulars of the purpose of the deposit, of the amount and limit of the advance, and provides that the security shall be a continuing one. A schedule is attached giving full details of the instruments lodged by the customer, and, as a rule, the document is executed by the customer in the presence of a witness over a 6d. adhesive stamp. A memorandum of this kind is imperative in all cases where security is deposited by a third party, for in such circumstances it is essential to obtain the signature of the surety to clauses in the document which provide that the banker's claim against him shall not be prejudiced by any time granted to the debtor, or by any variation of the original agreement made with him and the surety. If the security is given to cover the account of a partnership, the memorandum should state that the banker's position will not be affected by any change in the constitution of the firm resulting from the death, bankruptcy, insanity, retirement or admission of a partner. In the case of a limited company customer, the memorandum will provide that the relationship of the banker and the surety shall not be affected by any change in the constitution of the company by reason of its absorption or amalgamation.

As in the case of all agreements under hand a statement of the consideration should be included : in the case of a memorandum of deposit the consideration is usually stated to be an advance of specified amount, or an agreement by the banker

not to require immediate repayment of sums due or to become due from the customer.

The effect of a pledge is that the pledgee, if he takes in good faith, obtains an independent title to the property pledged and a right to sue in respect thereof to the extent of the money advanced by him, and to retain the property until his debt is discharged even as against the true owner. Thus, if a person in possession of negotiable securities or transferable documents of title pledges them with a banker as security for an advance, the banker will usually be able to retain the instruments until his debt is paid. As a rule, the pledgee has power to sell the property pledged if he must do so in order to obtain repayment of his debt, but if he exercises such power, he must account to the pledgor for any surplus remaining after deducting what is due to him.

In the case of *fully negotiable* securities, a memorandum is not absolutely necessary in order to evidence the pledge, although, for the reasons already stated, it is desirable to have clear evidence of the arrangement in writing. Nevertheless, in respect of such securities, the lender, provided he acts in good faith, is established as a pledgee by their mere deposit, with an absolute title against all the world to hold the securities until his debt is discharged, and to realise them by sale or otherwise if he does not obtain repayment. This is so even if the instruments have been lost by or stolen from the true owner, and, as indorsement is not necessary for the transfer of fully negotiable securities such as bearer bonds, the title of the pledgee cannot be defeated by a forgery.

In several cases the question has been raised as to whether a banker can be regarded as acting in good faith if he takes negotiable securities as cover for an overdraft granted to a stockbroker, or similar agent, who from the nature of his business should be presumed to have possession of the securities only as agent for his clients. In many quarters it has been maintained that in such circumstances it is the obvious duty of the bank to enquire into the nature and extent of the authority of the person depositing the securities as cover for his own account, but in *London Joint Stock Bank v. Simmons*, 1892, it was clearly pointed out that a banker who acts in good faith in accepting such securities obtains a good title to them as a pledgee, and is not put under the obligation of enquiring into the title of the person who is in possession of the instruments, provided there is nothing in the circumstances to arouse suspicion.

The pledge of documents of title to goods is in effect a pledge of the goods themselves, for delivery of the documents is legally recognised as a constructive delivery of the goods which they represent.

In the case of a *mortgage*, as in the case of a pledge, the banker does not become the absolute owner of the relative property, but he is entitled to claim and if necessary to realise it, in

order to discharge the debt owing to him by his customer. The banker's claim over securities is usually evidenced by mortgage in the case of title deeds to land and buildings, stocks and shares, and life policies, although in the last case the arrangement is usually referred to as an *assignment*. Mortgages are of two kinds: (a) *legal* mortgages, and (b) *equitable* mortgages. A legal mortgage is taken by deed under seal, and has the effect of transferring a title in the relative property to the mortgagee subject to certain conditions. As a rule, the possession of the property remains with the mortgagor, but the mortgagee is given a right of sale in the event of default on the part of the mortgagor in paying the principal of the debt or interest thereon, and in certain other circumstances. On the other hand, the mortgagor is left with his equity of redemption, i.e., his power to reclaim the full ownership of the property on properly discharging the mortgage.

An equitable mortgage may be created by the deposit of the deeds of title to property, or of the certificates to stocks and shares, either with or without a memorandum of deposit. In the case of an equitable mortgage over land, the mortgagee may further perfect his title by obtaining a legal mortgage, while in the case of stock and share certificates, the mortgagee may enforce a transfer of the securities to him.

### Informal Security : Banker's Lien.

Apart from the formal or specific deposit with him of securities as cover for an overdraft or loan, a banker who has granted an advance to a customer may obtain a legal claim to securities of that customer which pass through his hands in the ordinary course of business, by virtue of his right of "*lien*". A "*lien*" is defined as the right of one person to *retain* property in his hands belonging to another until certain legal demands against the owner of the property by the person in possession are satisfied. Thus a creditor may have a lien over the goods and chattels of his debtor in respect of the obligation existing between them.

The right of lien may be either a *particular* lien or a *general* lien. A particular lien is so called because it confers a right to retain goods in connection with which a particular debt arose, whereas a general lien confers a right to retain goods, not only in respect of the debt incurred in connection with them, but also in respect of the *general* balance due by the owner of the goods to the person exercising the right of lien. In other words, a particular lien applies only to one transaction, or certain transactions, whereas a general lien extends to all transactions arising out of the course of dealing between the parties. The right of general lien most usually belongs to persons who act as agents on behalf of others, as, for example, solicitors, bankers, stock-brokers, produce-brokers, factors, and wharfingers. In these

cases the right of general lien has by long-established custom become part of the Law Merchant and is judicially recognised in the Courts.

No special arrangement or agreement is *necessary* to create the right of lien; it arises usually out of the course of dealings between the parties. Nevertheless, the right of lien may be and often is expressly conferred by agreement, while on the contrary, it may be definitely excluded by mutual arrangement between the parties, or by the existence of circumstances which are inconsistent with the right of lien. It is most important to observe from the definition of "lien", that it is merely a right to *retain* goods or securities, so that it does not *as a general rule* give the person exercising the lien any power to sell the relative goods or securities.

The banker's right of lien over securities and property of his customer which come into his hands was accorded full legal recognition in the well-known and oft-quoted case of *Brandao v. Barnett*, 1846, where it was stated: "Bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract, or circumstances that show an implied contract inconsistent with lien". From this statement it is clear that a banker has a right to retain, in respect of a debt due to him, any securities of his customer which come into his hands in the ordinary course of his business as a banker. Thus the lien would extend to all negotiable securities such as bearer bonds, share warrants to bearer, and coupons, while it would also embrace stock and share certificates, documents of title to goods and deeds of title to land and buildings. But it must be noted that the lien will be definitely excluded if the securities come into the banker's hands in any capacity *other than that of banker*, and also if there is an implied or express contract negating the lien. In order that the lien may arise the banker must act simply and solely as a banker; the securities must be deposited by or on behalf of a customer who is in debt, and there must be no express or implied contract that the lien shall not arise.

By virtue of these considerations, it will be clear that a banker has a lien over all bills of exchange, promissory notes, coupons, bonds, etc., which come into his hands as a collecting banker. But no lien will arise if such articles are expressly deposited *for safe custody*, for in such a case the articles are received by the banker as a bailee and not in the capacity of banker. In connection with coupons and bonds left for safe custody, however, it is sometimes difficult to determine the precise line of demarcation between the banker's capacity as a bailee and his essential functions as a banker. This matter is discussed at length in Chapter 25.

A *general* lien cannot arise in respect of securities which are deposited for a special purpose only, although the circumstances

may be such as to create a *particular* lien in respect of the securities. Thus, a banker cannot exercise a general lien on a scrip certificate deposited by a customer with express instructions that it is to be exchanged for a bond, for in such circumstances the banker acts merely in the capacity of agent and not strictly as a banker. Nor can a general lien be exercised in respect of property of a customer which is pledged as security for a *particular* debt. Thus if A has two overdrafts at a bank, and specifically pledges securities in connection with one of these overdrafts, the banker cannot exercise his general lien so as to retain the securities against the overdraft on the second account. But if the banker had exercised his power of sale over the securities in order to wipe off the overdraft on the first account, he would have a lien over any remaining proceeds of the sale which were unapplied.

Moreover, no lien can arise in respect of property which comes into the banker's hands by mistake, or which is placed in his hands with the object of covering an advance which is not granted.

By virtue of Sub-section 27 (3) of the Bills of Exchange Act, 1882, a banker is deemed to be a holder for value of bills of exchange, promissory notes and cheques which come into his hands in the ordinary course of his business as a banker *to the extent of the sum for which he has a lien*. And as a banker would ordinarily take such instruments in good faith and before they were overdue, he would generally occupy the position of a holder in due course, and as such could sue the acceptor and any prior parties to the bill in his own name, in spite of the fact that the title of his customer may be defective. But although the banker is thus enabled to take action on the bill for the whole amount, nevertheless, if his lien does not extend to the whole sum received in payment of the instrument, he must hand any surplus to his customer, or, if the customer's title is defective, to the true owner.

### **The Banker's Lien on Negotiable Securities.**

As has been stated, the banker's general lien ordinarily gives him only a right to retain the securities which come into his hands, but in the case of fully negotiable securities, such as bearer bonds, coupons, and share warrants to bearer, the lien of a banker is regarded as an implied pledge conferring upon him power to realise such securities and apply the proceeds in satisfaction of his debt. This right of sale or realisation may be exercised by the banker without any reference to the customer if the latter cannot pay or refuses to pay the amount due by him on overdraft or loan account. The right of sale does not, however, extend to other securities such as title deeds or documents of title to goods, in which cases the banker merely has a right to retain the instruments until his demands are satisfied.

But, even in the case of negotiable securities, the lien would not arise if the instruments were placed in the banker's hands for a special purpose only, as, for example, for safe custody, or if there was an express or implied contract between the banker and his customer inconsistent with the right of lien. Thus, lien would apply to bills of exchange placed in a banker's hands for collection, but it would not arise if the bills were expressly handed to a banker for the purpose of being presented for acceptance to the drawee. In the latter circumstances the banker is merely an agent for his customer, and does not act in the capacity of a banker.

The banker's lien over negotiable securities is so strong and well established that it applies even to instruments which are not actually the property of the customer. Thus if the customer deposits bearer bonds with a banker for collection in the ordinary course of business, the banker may be able to exercise his rights over the instruments even as against the true owner.

It is scarcely necessary to add that the banker's right of lien over negotiable securities will be defeated as against the true owner if the instruments suffer from some absolute defect, as for example, where a bill or cheque bears a forged indorsement, or a cheque bears a not negotiable crossing and has been stolen from or lost by the true owner. Moreover, a banker cannot enforce his right of lien even against negotiable securities if it can be shown that he has not acted in good faith. As to what is good faith in the particular circumstances will depend on the facts of the case, but a banker cannot exercise his right of lien if it can be shown that he had any express or constructive notice that the securities concerned were not the property of the customer.

### **The Banker's Lien over Money.**

On similar grounds it is sometimes stated that a banker has a lien over any money of his customer which comes into his hands in the ordinary course of business. Thus, any funds received on behalf of a customer in respect of securities sold or bills or cheques sent for collection are unquestionably subject to the banker's lien when such funds reach his hands.

It is also contended that it is by virtue of this principle of lien and not by reason of a right of set-off that a banker is entitled to retain any credit balance in a customer's name against any overdraft or loan for which the same customer is personally liable, although it is not altogether clear in view of the decision in *Greenhalgh v. Union Bank of Manchester*, 1924, whether the right of lien or set-off could be exercised unless either there was some express or implied agreement between the banker and the customer, or the right could be inferred from the course of business between the parties.

But, in any case, a banker has no right of lien on the credit balance of a deceased customer's account in respect of any overdraft created by his personal representatives, neither has he any lien over the private credit balance or the deposit account of a partner in respect of a debt due to the bank by the firm, or *vice versa*, for in such circumstances the credit on the one hand, and the liability on the other, do not exist *in the same right*. Again, a banker cannot exercise any right of lien in respect of money deposited by a customer, or a credit balance created by a customer, for a specific purpose of which he is cognisant, although presumably the lien would arise if the banker had no express or constructive notice of the purpose of the deposit of funds or of the credit balance.

### Lien and the Statutes of Limitation.

As has been pointed out, the effect of the Statute of Limitation is to bar the right of action of a creditor in respect of a debt or contract which has been outstanding for more than six years without any acknowledgment or part payment. But this does not apply to the giving of security in respect of the debt, for although the effect of the Statute is to bar the *personal* remedy, it does not extinguish the debt concerned, and it is open to the creditor, if he can do so, to enforce his rights or obtain repayment in any way which is open to him. For these reasons, a banker's right of lien is not barred by the Statute of Limitation even if the debt in respect of which the lien arises is so barred. Accordingly, if a banker holds securities against a debt which is statute-barred, he may retain and, if they are negotiable, sell them although he has no right of action on the debt itself. It is, however, provided in the *Real Property Limitation Act, 1874*, that in the case of securities relating to land, the personal remedy and also the remedy on the securities is barred after twelve years from the time when the right of action first arose.

### Estimating the Worth of a Collateral Security.

In estimating the worth of collateral security which is offered by a customer the banker should consider at least the following seven important points. (a) *Simplicity of title*. The security should be such that the customer's title thereto is plain and unmistakable on the face of the instrument, and that, if necessary, the banker's title thereto can be perfected without difficulty. (b) *Transfer should be cheap and easy*, so that the banker can if necessary obtain a complete transfer of the title to him or to his nominees without any great trouble or expense. (c) *Reasonable steadiness of value*. A security which is subject to wide variation in price does not form a desirable cover for an advance, since



the banker cannot at any particular time ensure that he has allowed himself a sufficient margin to provide against possible default on the part of the customer. (d) *Readiness of sale.* This point is of importance if the banker is to avoid being left with property on his hands which he cannot convert into cash except after considerable trouble and expense, or after the expiration of a considerable period of time. The acceptance of unsaleable security is clearly undesirable from the point of view of the liquidity of the banker's resources. (e) *Sufficient margin for loss or depreciation.* This point is to some extent covered by the third consideration mentioned, for unless the security is one whose value is fairly stable, the banker cannot at any particular time ensure that he has a sufficient margin in the event of a forced realisation becoming necessary. (f) *Absence of liability.* As far as possible the banker will avoid taking as security property which, if it passes into his ownership, would involve him in liability to third parties, as, for example, shares whereon future calls may be made, or leasehold property which may involve considerable expense in the way of repairs or renewals when the lease expires. (g) *Safety as to title.* A final requirement is that the title (if any) obtained by the banker, or the title which the customer purports to possess, shall be secure against loss by theft or fraud. Thus the title to negotiable securities may be lost if they are stolen from the banker or obtained from him by fraud, for as already pointed out, the person in possession of fully negotiable instruments payable to bearer, i.e., even a finder or thief, is in the position to pass a valid title to anyone who takes the instruments in good faith and for value.

### The Register of Securities.

Full details of all securities left in his hands by customers are recorded by the banker in special Registers kept for the purpose. As a rule all securities are divided into two broad classes : (a) those which are *inconvertible* or not negotiable, and (b) those which are negotiable or *convertible*, particulars of the two classes being recorded in the Register of Inconvertible Securities and the Register of Convertible Securities respectively. Sometimes the Register of Convertible Securities is merely supplementary to the Register of Securities, the latter containing particulars of *all* securities, convertible or inconvertible, and the former containing a record of the convertible items for purposes of more effective control. Specimen rulings of these books are given on page 582.

The object of the record in the Security Registers is to enable the banker to see at a glance, without reference to the actual securities, the precise nature of the security held on behalf of any particular customer, its approximate market value, and the nature of the charge over it. Accordingly, the full name and

## REGISTER OF SECURITIES

JAMES BROWN, 17 EAST STREET, NORTHTOWN. DRAPER

Date Deposited.	Branch Initials in.	L/O No.	Nature of Charge and formalities.	Description of Security and Specification of documents.	G/R.	Rent or R/V.	Value.	When given up, etc.	Branch Initials out.
10.. 19 June	R.B., J.T.	17968	Memo. of Dep.	80 £1 Ord. Shares, fully paid, Nos. 17632-17711, Bleachers' Association, Ltd. Certificate No. 27108 Notice to Company, 19/6/19.. Ackd. 23/6/19..	..	..	£170	..	..
	R.B., J.T.	26171	Assignment	5 £100 5% Exchequer Bonds, Nos. 1785-1789 Cpns. due 1st June and 1st Dec. Whole Life Policy for £300 on customer's own life, Life Association of Scotland No. 8296; 1/11/1903. A.P.: £4:11:3, due 1/11 Notice to Company, 19/6/.. Ackd. 23/6/..	..	..	s.v.£100	..	..
	R.B., J.T.	11973	Mortgage	Freehold House and Shop, 17 East St., Northtown. Conveyance, 1/6/19.. Henry White to James Brown, cons. £975. Solicitor's Report (Ambrose & Son), 1/6/19.. P.P. No. 1896, Norwich Union. A.P., 30/-, due, 2/7/19..	..	£40	£500	..	..

## REGISTER OF CONVERTIBLE SECURITIES

5 PER CENT. EXCHEQUER BONDS. Coupons due 1st June and 1st December

Po. in Name Book or Sec. Reg.	NAME OF CUSTOMER.	BONDS.		NUMBER OF BONDS.	EXAMINED.		INSPECTOR'S INITIALS.	When and How Disposed of.
		Total Number.	Aggregate Amount.		In	Out		
17	James Brown, 17 East Street.	5	£500	1785-1789	R.B., J. T.		M.D.	

particulars relative to each customer are recorded at the head of the relative page in the Register, and in the columns provided are given the date of the deposit of each security, the nature of the banker's charge, particulars of the security, its nominal value, and an indication of its true market worth (which is necessarily revised from time to time). Finally, columns are provided for particulars of the date on which the articles are returned to the customer, or the date when the charge is cancelled, and for the signature of the customer or particulars of the receipt given by him.

In the case of certificates for stocks and shares, particulars are recorded of the nature of the banker's charge, of the number of the instruments, of the description, nature and nominal value of the security, and of the amount paid up, if that differs from the nominal value. In addition, the actual market value of the security will be from time to time recorded, and if the instruments are registered in the name of a person other than the customer on whose behalf they are held as security, particulars of that fact will be included.

In the case of life policies the particulars will include the name of the company, the number, amount and date of payment of the policy, the amount of the premium and the date on which it is payable, the name of the person whose life is assured, particulars of any charge over the policy, and details of the assignment of the instrument to the bank, together with the date of the acknowledgment given by the insurance company. From time to time steps will be taken by the banker to ascertain the present surrender value of the policy, and such value will be entered together with the relative date in the column provided for the purpose.

In registering deeds, it would frequently be very troublesome and quite unnecessary to detail particulars of all the documents which confer the title to the property on the present owner. Consequently, it is usual for a banker to record in his Register of Securities particulars of only the last instrument conveying the title, details being given of the nature and situation of the property, of the name of the owner, whether the property is freehold or leasehold, the rateable value and the rental value. In the case of land, the acreage will be specified, while in the case of leasehold property, particulars will be given of the number of years the lease has still to run and of any ground rents which are payable. In the case of buildings, particulars will be added of any existing fire policy or fire policies, and of the dates of payment of the premium or premiums. In addition, any matters of importance affecting the title to the property or the value thereof will be specified for the information of anyone who has occasion to consult the Register, as, for example, the fact that the banker has received notice of a second mortgage in cases where his security consists of a first mortgage. As it is usual to

obtain a solicitor's report on the customer's title to deeds of property, the date of such a report will be indicated. In the relative column a note will be made of the ascertained or estimated market value of the property, the estimate, if any, being made by the manager himself, or by some reliable independent party.

Similar particulars are entered in the case of negotiable or convertible securities, but in addition a note is made, usually in red ink, of the dates on which coupons or dividends are due for payment. If bonds with coupons attached are left in the banker's hands for security, it is his duty to make due presentment of the coupons for payment on their due date, and if this is not done he will be liable to the customer for any loss which ensues. In order to safeguard himself in this respect it is, therefore, usual for particulars of all such securities to be recorded in a Coupon Register, and also in a diary under the due dates.

Any other forms of security are entered in a similar manner, the object in all cases being to give precise and reliable information of the nature and worth of the security.

### **Receipts for Securities.**

A numbered and signed receipt is given by a banker in respect of all securities left in his hands by customers, the customer usually being required to return the receipt duly discharged when the relative items are withdrawn from the bank. At the time of the deposit the customer is usually requested to sign a counterfoil giving the same particulars as the receipt, the counterfoil thus serving the dual purpose of affording valuable evidence in the event of a dispute as to the nature of the security, and also providing the banker with a specimen of the customer's signature. (See Chapter 25.)

### **Procedure on the Realisation of Securities.**

From time to time a banker is compelled to resort to the realisation of securities deposited with him in order to obtain repayment of the debt due by a customer. The method to be adopted in any particular case depends partly on the nature of the securities, and partly on the capacity in which they are held by the banker, but even where the charge held by the banker gives him absolute power to realise the security at any time, he should not take such a step without first of all demanding payment of the debt, and giving the customer reasonable time in which to make the necessary arrangements.

In the case of negotiable securities subject to a charge or subject to the banker's general lien, the banker may without difficulty exercise his power of sale without the sanction or signature of the customer. Similarly, in the case of bills of exchange, promissory notes and cheques, the banker, being in

the position of a holder for value to the extent of his lien, can sue on the instrument in his own name and obtain repayment of his debt without reference to his customer. Again, in respect of goods which have been pledged with the banker by the deposit of the relative documents of title with or without a memorandum, the banker may exercise his power of sale on the customer's default without resort to the Court provided reasonable notice of his intention to sell is given to the pledgor. As to what constitutes default on the part of a customer sufficient to give a banker a right to realise such securities depends upon the circumstances, but apparently if an advance is payable on a fixed date, default occurs if payment is not made on that date. On the other hand, if no time for repayment is fixed, default arises if the debt is not repaid at the expiration of reasonable notice to the customer.

It must be noted that the banker's power of sale applies only to goods or chattels which are pledged with him or negotiable securities over which he has a right of lien. In the case of non-negotiable securities, such as deeds of title to land and buildings, stock and share certificates and life policies, the banker's right is merely that of an equitable or legal mortgagee, in which case, although the banker may have a power of sale, he cannot usually pass a complete title to the property without the concurrence of the customer. Thus where a banker holds an equitable mortgage over title deeds to land he must, first of all, apply to the Court for power to sell or to foreclose, i.e., power to take possession of the property. When he is in possession of a legal mortgage he can exercise his power of sale, but the title to the property must ultimately be transferred by the mortgagor. Again, if stocks and shares are deposited with the banker with or without a memorandum, the banker must resort to the Court for power to transfer or sell the security concerned, but the customer's signature is necessary to transfer the title. On the other hand, if the banker has actually taken a legal and complete transfer of the stock or shares, he may sell and transfer the security without resort to the Court and without the sanction of the customer.

In all cases where security deposited by a third party is realised, the proceeds should be placed to a Suspense Account and not applied to extinguish the customer's debt. The object of this precaution is to enable the banker to deal with the realised security as collateral and, if necessary, to prove for the full amount due to him by the customer against his estate in the event of his bankruptcy (see Chapter 20).

### **Disposal of Any Surplus on Realisation.**

In view of the fact that bankers take due care to ensure that the security held by them in respect of an advance is well in excess of the customer's liability, it not infrequently happens

that the proceeds received on the realisation of securities are in excess of the debt due by the customer. As a general rule, any such surplus will belong to the customer if *his own* securities have been realised, or to a third party if securities belonging to such a party have been sold. The banker must, therefore, pay over any such surplus to the debtor or to the third party, or hold it at his disposal, and he need not take notice of claims made by other parties to that balance or of any further charge over the security.

Only in exceptional circumstances is the banker entitled to retain any such surplus as his own property. This may arise, for example, in cases where a banker has taken bills of exchange, promissory notes, or cheques as an absolute transferee in respect of an advance of less amount given to the customer. On the other hand, there is nothing to prevent the banker from exercising his right of general lien over such surplus if the customer is otherwise indebted to him, or since the original demand for repayment has incurred any fresh obligation to the bank. Thus, if securities or documents of title to goods are pledged with the banker to cover acceptances of his customer payable at the bank, or to cover bills accepted on behalf of the customer, any surplus arising from the realisation of the securities or goods, in the event of the customer's default to make necessary provision for the acceptances, will become subject to the banker's general lien.

An exception to this general principle arises in the case of any surplus which accrues to the banker by virtue of the sale of land or buildings mortgaged to the bank by a customer. In such cases it is usually provided that any surplus, beyond the sum specifically secured by the mortgage and the expenses incurred over the realisation, shall be paid to the mortgagor on application, although a banker may be enabled to retain the surplus if the mortgage was drafted to apply to *any* advances of the customer, or in cases where the sale of the property is effected under order of the Court and the Court gives the banker power to retain the surplus. In no circumstances, however, could a banker retain any surplus received in consequence of the sale of mortgaged property if he had received notice that a third party held a second charge over the property.

Finally, it should be noted that if a customer offers to repay the amount due to the banker, he is entitled to the return of any securities specifically deposited by him as cover for the advance, and in such a case the banker has no right to retain the securities in respect of any other liabilities or obligations of the customer. Moreover, if the security held in respect of a loan or overdraft has been deposited by a third party, such party is entitled to the return of the security on paying off the debt, and he is further entitled to the benefit of any securities deposited by the customer himself in respect of the advance. But a banker should not surrender such securities or their proceeds to the surety without first obtaining the consent of the customer or of any other

party interested in their disposal, as, for example, the customer's trustee in bankruptcy.

## STOCKS AND SHARES AS SECURITY

The most common and probably the most desirable form of security which is taken by a banker consists of what are collectively described as *stock exchange securities*, including stock and share certificates, debentures, bearer bonds, and scrip certificates, issued by joint-stock companies and other corporations, by local authorities, and by home, foreign and colonial governments. Apart from being deposited by ordinary customers of a bank as cover for advances, stock exchange securities form the backing or cover for the greater proportion of loans made by a banker to the money market, the stock exchange brokers and dealers depositing such securities with the banker as cover for loans obtained at call, from day to day, or at short notice. Loans of the latter kind are clearly much more liquid than those made to a bank's ordinary customers, as they are usually of short duration and are automatically repaid or capable of being recalled at the stock exchange fortnightly settlement.

In estimating the value of security of this kind, the banker must apply the various tests referred to in an earlier paragraph. As a rule, stock exchange securities have the advantages from the banker's point of view that they can be realised without difficulty, that the title is clear and unmistakable, being transferable easily and at little expense, and that the actual market worth can easily be determined. Moreover, if a careful discretion is exercised as to which securities are accepted, the banker will choose those which are not subject to violent fluctuations in price, while he has at his disposal ample facilities for determining whether the securities deposited are reasonably secure.

Stock exchange securities are generally divisible into two broad classes: (a) fully negotiable or convertible securities, and (b) non-negotiable or inconvertible securities.

### Fully Negotiable Securities.

Fully negotiable securities of reputable concerns probably form the ideal type of security against which an advance may be granted. As a rule they are reasonably stable in value, and are readily sold without difficulty or expense. Moreover, upon the default of the customer, the banker may obtain the full legal title to the security by virtue of his general lien, whether they are or are not deposited with a memorandum, and whether the securities actually belong to the customer or not, provided the banker has no notice of any defect in the title of the depositor. In practice, a Memorandum of Deposit similar to the specimen overleaf is invariably taken with such securities, so that the banker

## MEMORANDUM OF DEPOSIT OF BONDS AND SHARE CERTIFICATES

## TO THE NORTHERN BANK LIMITED

IN consideration of your agreeing at my request not to require immediate payment of such of the sums mentioned below as may be now due and in consideration of any like sums which you may hereafter advance or permit to become due, I, the undersigned *James Brown, of 17 East Street, Northtown, Draper*, hereby declare that I have deposited with you the documents specified in the schedule hereto (which documents and the securities to which they relate are herein after referred to as "the said securities"), as a security for any sum or sums of money which may be now or may hereafter from time to time become due or owing to you anywhere by me either solely or jointly with any other person or persons in partnership or otherwise and whether as principal or surety upon Banking account or upon any discount or other account or for any other matter or thing whatsoever including the usual banking charges.

In case of default in payment of such sum or sums on demand it shall be lawful for you to sell the said securities or any part thereof upon such terms and in such manner as you may think proper. And I hereby agree upon request to execute a transfer and all other requisite assurances for effectually vesting the said securities in such person or persons as you may direct or appoint.

This is to be a continuing security notwithstanding any settlement of account or otherwise and it is to be in addition and without prejudice to any other securities which you may now or hereafter hold from or on account of me.

And I declare that in the event of your receiving notice that I have encumbered or disposed of the said securities or any part thereof you shall be entitled to close my then current account and to open a new account with me and that no money paid in or carried to the credit of such new account shall be appropriated towards or have the effect of discharging any part of the amount due to you at the time you received such notice as aforesaid.

As witness my hand this 17th day of June One thousand nine hundred and . . . . .

Signed by the above-named  
*James Brown*  
in the presence of *William James,*  
10 West Street,  
Northtown.  
Clerk.

} *James Brown.*

## SCHEDULE OF DOCUMENTS DEPOSITED

5 £100 5% National War Bonds, 1929, Nos. 17964-17968.  
Cert. No. 2151, 50 £1 Ordinary Shares, Bleachers' Association, Ltd.  
1 Share Warrant to Bearer, No. 1794, for 10 shares of £100 each, The Southern Company, Limited.

*N.B.*—The Bank is not responsible for any loss that may be incurred through the non-presentation of Interest Coupons or of Bonds which may be drawn for payment or become due or for the non-payment of Calls on Scrip or otherwise. All requisite Notices to be given by the Depositor.



may be safeguarded by having the customer's expressed acknowledgment of the purpose for which the deposit is made, and so that the cover shall be expressly agreed to be a *continuing* security. Possibly the only objection to negotiable securities is that they may be lost or stolen during the time when they are in the banker's hands, or that the banker's title may be defeated if it can be shown that he took the articles without good faith or with express or implied notice that they were not the property of the customer.

As to what constitutes notice for this purpose is a question of fact depending on the circumstances. The point has been raised in a number of cases, but as most bankers nowadays act in good faith and exercise reasonable precautions before accepting such securities, the majority of the decisions have been in their favour. Moreover, it must be remembered that a thing may be done in good faith even though it is done negligently, so long as the negligence is not so gross as to afford evidence of bad faith when considered in conjunction with the attendant circumstances. Thus, in *London Joint-Stock Bank v. Simmons*, 1892, it was held that the mere fact that negotiable securities are deposited by a stockbroker or other person who usually acts as agent on behalf of others does not of itself put the banker on enquiry as to whether the securities do in fact belong to the depositor. A similar decision was given in the more recent case of *Eckstein v. Midland Bank Limited*, 1926, where the bank was held entitled to the ownership of negotiable securities received by it in good faith as security for an advance granted to a stockbroker, who had no title to the securities.

But a banker would not be protected if there were any circumstances connected with the transaction which should have aroused his suspicion, or if he could be regarded as having received actual or constructive notice that the securities were not those of the customer. Moreover, the securities must be such as are properly recognised as negotiable; but here again the question is largely a matter of fact. Thus many instruments such as bonds to bearer, share warrants to bearer (see specimen overleaf), exchequer bonds, East India bonds, treasury bills, scrip certificates to bearer, and debentures to bearer, have been recognised as negotiable by our Courts by virtue of the fact that they have been so regarded by long-established mercantile custom. From time to time, however, the Courts are called upon to decide whether or not an instrument is to be properly regarded as negotiable in cases where there is no existing authority on the point, although it may be taken as generally correct that any instruments of the type referred to above, whether issued by a home or foreign trading concern or government, will be regarded as negotiable in British Courts of law.

Nevertheless, difficult questions sometimes arise in connection with the principle referred to as *negotiability by estoppel*, by virtue of which the issuer or true owner of certain instruments

**SPECIMEN FORM OF SHARE WARRANT TO BEARER**  
(WITH TALON AND COUPON ATTACHED)

---

**THE SOUTHERN COMPANY, LIMITED.**

Incorporated under the Companies Acts, 1908 to 1917.

CAPITAL £1,000,000.

Divided into 100,000 Shares of £10 each.

Share Warrant to Bearer for 100 Shares of £10 each.

Share Warrant No. 1794.

This is to Certify that the Bearer of this Warrant is entitled to 100 (one hundred) fully paid up Shares of ten pounds each numbered as below, in the THE SOUTHERN COMPANY, LIMITED, subject to the Regulations of the Company and to the conditions for the time being governing the holding of the Share Warrants to Bearer issued by the Company.

NUMBER OF SHARES	DISTINCTIVE NUMBERS (Inclusive)	
100	From	To
	854	953

Given under the Common Seal of the Company  
this 17th day of September, 19...

JAMES BROWN, *Director.*  
THOMAS ROBINSON, *Secretary.*



**NOTE.**—This Warrant is issued subject to the Conditions for the time being governing the holding of Share Warrants in the Company as determined by the Board of Directors of the Company. Such Conditions may be obtained free of charge at the Offices of the Company, London Wall, London, E.C.2.

.....

**THE SOUTHERN COMPANY, LIMITED.**

Share Warrant No. 1794.

Talon for Fresh Supply of  
Coupons for Share Warrant  
to bearer representing  
100 Shares

The Bearer of the above Warrant will  
receive in exchange for this Talon a fresh  
supply of Coupons when those below  
have fallen due.

THOMAS ROBINSON, *Secretary.*

.....

**THE SOUTHERN COMPANY, LIMITED.**

Dividend Coupon No. 3 on 100 Shares.

Included in the Share Warrant numbered as below for Dividend payable  
according to Advertisement to be issued by the Company

No. 1794

THOMAS ROBINSON, *Secretary.*

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SCRIP CERTIFICATE TO BEARER WITH COUPON ATTACHED  
 £100. No. 1736.

**SOUTHERN TRADING COMPANY, LIMITED**

Issue of £100,000 7% First Mortgage Debentures to Bearer.

**SCRIP CERTIFICATE for £100.**

The Bearer of this Scrip Certificate has paid in respect of One hundred pounds of the above Issue, the sum of £20, leaving a balance of £80, payable as follows:—

- £10 per cent. on January 1st, 19...
- £10 per cent. on February 1st, 19...
- £10 per cent. on March 1st, 19...
- £25 per cent. on April 1st, 19...
- £25 per cent. on May 1st, 19...

After payment of the above instalments the Bearer will be entitled to a duly stamped bond in exchange for this Scrip Certificate. Due notice will be given by advertisement in *THE TIMES* when the bonds are ready for delivery.

Default in payment of any Instalment will render all previous payments liable to forfeiture.

For the NORTHERN BANK LTD,  
*Henry White,*  
 General Manager.

Regd.  
*A. James,*  
 17 Lombard St., E.C.,  
 17th December, 19...

RECEIPT FOR INSTALMENT OF £10%. Due January 1st, 19...  
 Received \_\_\_\_\_ 19.., the sum of Ten pounds, being the  
 Instalment due 1st January, 19... For NORTHERN BANK LTD.  
 £10. \_\_\_\_\_ Cashier.

RECEIPT FOR INSTALMENT OF £10%. Due February 1st, 19...  
 Received \_\_\_\_\_ 19.., the sum of Ten pounds, being the  
 Instalment due 1st February, 19... For NORTHERN BANK LTD.  
 £10. \_\_\_\_\_ Cashier.

RECEIPT FOR INSTALMENT OF £10%. Due March 1st, 19...  
 Received \_\_\_\_\_ 19.., the sum of Ten pounds, being the  
 Instalment due 1st March, 19... For NORTHERN BANK LTD.  
 £10. \_\_\_\_\_ Cashier.

RECEIPT FOR INSTALMENT OF £25%. Due April 1st, 19...  
 Received \_\_\_\_\_ 19.., the sum of Twenty-five pounds,  
 being the Instalment due 1st April, 19... For NORTHERN BANK LTD.  
 £25. \_\_\_\_\_ Cashier.

RECEIPT FOR INSTALMENT OF £25%. Due May 1st, 19...  
 Received \_\_\_\_\_ 19.., the sum of Twenty-five pounds,  
 being the Final Instalment due 1st May, 19...  
 £25. \_\_\_\_\_ Cashier.  
 For NORTHERN BANK LTD.

When remitting the Instalments, this Certificate must accompany the remittance, and in all communications respecting this Certificate, please quote number and amount. The Receipts must not be detached from the Certificate.

SOUTHERN TRADING COMPANY, LTD.  
 7 per cent. 1st Mortgage Debentures.  
 COUPON for Three pounds ten shillings, due 1st June, 19... Payable

at The NORTHERN BANK LTD.  
*A. James.*

£3 : 10 : 0

may be precluded or estopped from denying the fact that they are negotiable, in cases where the instrument itself, although not generally recognised as negotiable, nevertheless bears on the face of it a statement or indication that it shall enjoy the qualities of negotiability. In such circumstances the Courts may be called upon to decide whether the instruments should in fact be regarded as negotiable, so that the issuers or the true owner may be estopped from denying the title of a person who has taken them in good faith, for value and without notice that the title of the transferor was defective.

For example, a company which issues debentures payable to bearer will generally be unable to deny the title of a *bona fide* holder for value who has received the instruments as being fully negotiable. Thus, in the case of *Eckstein v. Midland Bank* above referred to, the securities in question were Mexican Electric Tramways debentures payable to bearer. After receiving evidence showing that documents in similar form to these debentures were ordinarily treated in this country as negotiable instruments, the judge held that they were in fact negotiable securities, and that the true owner could not, therefore, recover from the bank which had taken them in good faith, for value, and without notice of any defect in the title of the transferor.

#### TREASURY BILL

Due 1st Dec. 19..

X. 1793.

£1000

X. 1793.

London.

This Treasury Bill entitles *James Brown*,  
or order, to payment of £1000 at the Bank of  
England out of the Consolidated Fund of the  
United Kingdom, on the 1st day of December 19..

Henry Robinson,  
*Secretary to His Majesty's Treasury.*

At the same time it must be remembered that because a security is thus held to be negotiable in the particular circumstances in question, it must not for that reason be considered to be negotiable for all purposes, or necessarily be regarded as having all the characteristics of a negotiable instrument.

As has been previously stated, particulars of all negotiable securities will be recorded both in the Security Register and in the Register of Convertible Securities. Moreover, the instruments should be fully examined in order to ensure that they are not in any way altered or defaced, and in cases where coupons

are attached, that all outstanding unpaid coupons are present, otherwise the bonds will not constitute a good delivery on the London Stock Exchange in the event of the banker having to realise them.

### **Inconvertible or Non-Negotiable Securities.**

Inconvertible stock exchange securities may belong to one of two broad classes: (a) *Inscribed* stocks, or (b) *Registered* stocks and shares.

**INSCRIBED STOCKS** are so called because the title of the owner is evidenced by an entry in the books of the bank or other agent by whom the stock is issued, and transfer thereof can be effected only if the owner either attends in person, or appoints an agent under power of attorney to attend upon his behalf. Thus, certain British Government stocks are inscribed in the books of the Bank of England, and attendance at the Bank of the owner in person, or of his agent authorised under seal, is essential before the title can be transferred. The receipt or acknowledgment issued to the owner of stock of this kind is valueless.

**REGISTERED STOCKS OR SHARES**, on the other hand, are evidenced by certificates given under the seal of the issuing body, and a full legal title to the property may be transferred by the delivery of the certificate accompanied by a transfer in writing or under seal.

In estimating the worth of inscribed or registered stock or shares as a security, similar tests must in general be applied as in the case of convertible securities, but in addition the banker must exercise precautions to ensure that the market value is properly ascertained, and that in accepting such security he does not render himself liable for the payment of instalments or calls which have not been paid up by the depositing customer. It is, therefore, of importance that the banker should ascertain whether the stock or shares are fully paid up or not, for this is a matter which necessarily has an important bearing on the market value of the security.

In both cases the only way in which the banker can perfect his title to the security is by going through the formality of transfer.

### **Inscribed Stocks as Security.**

In the case of inscribed stocks, as the receipt in the holder's name is valueless, no charge can be obtained thereover by deposit with or without a memorandum. As a rule, therefore, the only method by which the banker can perfect the security is by having the stock transferred into his own name or into the names of his nominees by inscription at the issuing bank. In certain cases, however, stock certificates to bearer, with interest coupons

attached, or registered stock certificates, may be obtained at the holder's option in respect of his holding of inscribed stock, and wherever this option can be exercised it affords a less cumbrous and more advantageous method of perfecting the security without the formality of inscription.

### Registered Stocks and Shares as Security.

The banker's security over registered stocks and shares takes the form of an equitable mortgage or a legal transfer of the title to the security. An equitable title is obtained by the deposit of the certificates with or without a memorandum, whereas the legal title is obtained by the execution of a transfer of the security to the bank or to its nominees, the transfer being effected in accordance with the regulations of the issuing company. Such regulations may be contained either in the Articles of Association of the company or in the Statute under which it is constituted, and will usually provide that the transfer shall be in writing, although it may be prescribed that the instrument must be under seal. If no special method is decreed, then the method of transfer will be that given by Table A of the Companies (Consolidation) Act, 1908, which provides that the instrument of transfer shall be executed by transferee and transferor, but that the transferee does not become holder of the security until his name is entered on the Company's Register of Members as a shareholder. Transfer of registered shares or stocks is, therefore, not effective until such transfer is registered in the Company's books, and a new certificate is issued in favour of the transferee.

Transfer is effected by forwarding a complete instrument of transfer in the form shown on page 597, together with the relative certificate, to the Company's Registered Office for registration. The transfer must be impressed with a deed stamp for 10s. if the transfer is for the purpose of securing the repayment of an advance or loan. If, however, the transaction is to operate as a sale or complete transfer of the title to the security, an *ad valorem* stamp at the rate of 1s. per £5 on the price is required. If the banker takes steps to register stocks and shares in his own name or in the name of his nominees, he will usually be well safeguarded and will obtain a good title to the property. But his position will be secure only if he takes the securities honestly and for value, and without notice of any prior claims against them. Thus, if a trustee lodges with a banker stocks and shares forming part of the trust property as a security for a private advance, the banker will obtain the title to the stocks and shares if he acts in good faith and without notice of the breach of trust, but if he has any such notice, or if there are reasonable grounds of suspicion, his title will be postponed to that of the beneficiaries under the trust.

A banker is, however, subject to certain risks even if he

becomes registered as the transferee of the securities. In the first place he renders himself liable as transferee, for an indefinite period to indemnify the company against any loss which it may incur if it should transpire that the transferor's signature to the instrument of transfer had been forged, for by virtue of the decision in the *Corporation of Sheffield v. Barclay*, 1905, a transferee who sends in for registration a forged transfer must indemnify the company which has acted on the assumption that the transfer was genuine, and this liability continues even though the transferee may have subsequently parted with the shares. This risk may be to some extent avoided if the banker insists that all transfers of shares taken by him as security are signed and witnessed in his presence.

The second risk of liability exists in the case of partly paid shares, for a banker who registers himself as transferee of such shares renders himself liable for the payment of any calls which may thereafter be made, up to the extent of any balance still unpaid on the shares, and this liability exists for one year after the bank or any other holder has ceased to hold the shares, if the person to whom they are transferred is unable to meet the liability for the uncalled capital. It is for this reason that bankers prefer not to accept partly paid shares as security, unless the possibility that the unpaid capital may be called up is very remote, as it is, for example, in the case of shares in the large English joint-stock banks.

### Equitable Mortgages of Stocks and Shares.

If the full legal title to stocks and shares deposited as security is not obtained, the banker may obtain an equitable title by: (a) mere deposit of the certificates; (b) deposit of the certificates with a Memorandum of Deposit, or (c) deposit of the certificates with a Memorandum of Transfer and duly executed blank transfers. Only very rarely would the first of these methods be adopted, for nowadays bankers almost invariably take a memorandum of deposit in all cases where stocks and shares are accepted as security, whether from the customer himself or from a third party.

A perusal of the specimen form of memorandum on page 588 will indicate that the object of the memorandum is to safeguard the banker as adequately as possible. It provides that the security shall be continuing, that the banker shall have an immediate power of sale of the security if the customer defaults in making repayment of the advance, and that the banker may debit the customer's account with any calls made by the company in respect of shares which are partly paid up. In cases where the stocks and shares are lodged by a third party to secure the liabilities of a customer, the memorandum will provide that the security is to be continuing, and that the surety shall not be

discharged by any arrangements as to the giving of time, etc., made between the banker and the principal debtor. As a rule such a memorandum is stamped as an agreement under hand with a 6d. adhesive stamp, which must be affixed within 14 days after the execution of the document. If, however, the memorandum is executed under seal, it requires an *ad valorem* stamp at the rate of 2s. 6d. per cent. on the nominal value of the security, the stamp to be impressed within 30 days of the execution of the document.

The mere deposit of stocks and shares with or without a memorandum does not give the banker the right to realise the security on the default of his customer, but he has the right to call upon the customer to execute a legal transfer, and if that is refused he can apply to the Court for an order to transfer and for power to sell the securities.

In the absence of complete registration as transferee of stocks and shares deposited with him as security, the banker's most effective method of securing himself is to take a *blank transfer* of the securities together with a Memorandum of Transfer signed by the customer depositing the security. Such a Memorandum of Transfer is in many respects similar to a memorandum of deposit, but that it acknowledges that the securities specified have actually been transferred to the banker, and that he is empowered to sell or otherwise deal with them as he thinks fit, upon default of the customer. A memorandum of transfer requires stamping like a memorandum of deposit with a 6d. adhesive agreement stamp if under hand, or with an *ad valorem* stamp as a mortgage, if under seal.

A blank transfer is merely an ordinary form of transfer which is incomplete in certain essential particulars, as, for example, the name of the transferee or the date. If the regulations of the company concerned prescribe that transfer of its stocks and shares shall be by *deed*, a blank transfer is almost useless to the banker, for a deed cannot validly be completed in any material particular after its original execution. The only loophole would seem to be that the transferor could make a redelivery of the instrument in the presence of the original witness and any other parties to the deed, but even here there are grave doubts as to the validity of the transaction. If, however, the transfer is *under hand* merely, the delivery of a blank transfer will constitute an authority to the transferee to fill up the blanks when he deems it necessary, while, if the space for the transferee's name is left blank, the banker taking the transfer may insert the name of himself or of his nominees, or the name of any other party. The primary object of a blank transfer is to escape the stamp duty ordinarily payable on a complete transfer of stocks and shares, but if the date is filled in the instrument must be fully stamped within thirty days of its execution (See Chapter 26). A properly stamped and dated blank transfer has the effect of



making the stocks or shares to which it relates *quasi negotiable*, for such instruments are frequently dealt with by custom as

**TRANSFER OF SHARES IN BLANK**



**3, James Brown, of 17 East Street, Northtown, in consideration of the sum of ten shillings paid by**

Stock forwarded to the Company's Office by  
 Coupon for £

hereinafter called the Transferee ,  
 DO hereby bargain, sell, assign, and transfer, to the said Transferee , 50 £1 Ordinary Fully paid Shares, Nos. 1768-1812, of and in the undertaking called the Bleachers' Association, Limited.

To hold unto the said Transferee his Executors, Administrators, and Assigns, subject to the several conditions on which I held the same immediately before the execution hereof, and the said Transferee , do hereby agree to accept and take the said shares subject to the conditions aforesaid.

As Witness our Hands and Seals this 17th day of June, in the year of our Lord, One thousand nine hundred and

Witness's	} Signed, sealed, and delivered by the above-named <i>James Brown</i> in the presence of { Signature, <i>Henry White</i> , [town]. Address, <i>174 North Avenue, North-</i> Occupation, <i>Clerk.</i>	} <i>James Brown</i>	} 
Witness's	} Signed, sealed, and delivered by the above-named in the presence of { Signature, Address, Occupation,	} ( <i>Transferee's signature</i> )	} 

being transferable by delivery, the delivery giving the lawful holder power to fill in his own name or the name of any party as transferee.

The defect of a blank transfer as security is that the banker obtains merely an *equitable* title, unless and until he takes steps to register himself as transferee. Consequently, there is some danger that, without the banker's knowledge, the customer may have transferred a prior equitable title or a full legal title to a third party, or that the registered owner may in fact hold the stock or shares merely as a trustee, in which case the beneficiaries of the trust will have a prior equitable title. In either of such cases the banker's rights are postponed to the claims of those holding the prior equitable or legal title, as the case may be, and he may therefore be called upon to surrender the securities. Again, if registration is not effected, the company may have a lien over the stock or shares as against the registered owner, or

the company may have received notice of a prior equitable title before the banker takes steps to register himself.

The banker's equitable title to stocks or shares may, however, be to some extent protected by giving the company concerned a *Notice of Lien*, or by applying to the Court for a *Notice in Lieu of Distringas* to be served on the company. Notice of lien, of which a specimen is given below, is forwarded to the company in duplicate by registered post, with a request that the company acknowledge the notice by indorsing and returning the duplicate.

#### NOTICE OF LIEN OVER SHARES IN A COMPANY

THE NORTHERN BANK, LTD.,  
NORTHTOWN,  
17th June, 19...

To the Secretary,  
*Southern Trading Co., Ltd.,*  
London, E.C.1.

DEAR SIR,

We hereby give you notice that we have a lien on the 100 ordinary shares in your Company standing in the name of *Henry White* of 171 High Street, Northtown, and numbered 1795-1894.

We shall be glad if you will kindly sign and return to us the enclosed duplicate notice, and at the same time be good enough to say whether you have received notice of any prior charges on the above shares.

Yours faithfully,

*per pro The Northern Bank, Limited,*  
*James Brown,*  
Manager.

The Duplicate is indorsed as follows :—

To *The Northern Bank, Ltd.,*  
Northtown.

DEAR SIRS,

We hereby acknowledge having received a copy of the notice on the other side written, and beg to state that we have not received any notice of a prior charge upon the shares.

*per pro The Southern Trading Co., Ltd.,*  
*William Arnold, Secretary.*

By virtue of Section 27 of the Companies (Consolidation) Act, 1908, however, a company is debarred from entering on its Register notice of any trust, whether express, implied or constructive, and it is usual for companies to return the notice with a reply in the following form :—

#### COMPANY'S REPLY TO NOTICE OF LIEN

THE SOUTHERN TRADING COMPANY, LTD.,  
LOMBARD STREET, E.C.2.,  
20th June, 19...

DEAR SIRS,

With reference to your communication dated the 17th June, 19..., which purports to be a notice of the deposit of certain Certificates of Stock (Shares) of

this Company with your Bank, I beg to inform you that the Company and its Officers are unable to recognise, or in any way act upon, the said communication. I return it herewith.

Yours faithfully,

Thomas Robinson,  
Secretary.

To the Manager,  
NORTHERN BANK, LTD.,  
NORTHTOWN.  
(per Registered Post.)

Even if such a reply is received, however, the effect of the notice will be to give the banker priority over any future advances which may be made by the company to the shareholder, for although the company may attempt to avoid receipt of the notice, it cannot thereafter alter its position relative to the shareholder concerned to the detriment of the banker holding an equitable charge over the shares. Moreover, the giving of notice may reveal the fact that the shares were being fraudulently dealt with by the customer, or that they were already subject to a prior charge, for in such cases the company concerned would usually advise the banker of the position.

A *Notice in Lieu of Distringas* may be served on a company after application by the equitable mortgagee to the Court, and as from the date of receipt of the notice, the company on which it is served will be restrained from transferring the shares or from paying any dividends thereon without giving the equitable claimant eight days' notice of the intended transfer or payment of dividend. But if after the expiration of eight days the equitable claimant takes no steps to obtain an order from the Court restraining the transfer of the shares or the payment of the dividend, the company may permit the transfer or make the payment.

On the whole it is clear that the advantages are in favour of the banker registering himself as transferee of any stocks or shares deposited with him as security, and this should almost invariably be done in cases where advances are likely to be outstanding for a considerable period. It must be remembered, however, that if registration is effected, any dividends or interest received belong to the customer, and must therefore be placed by the banker to the credit of the relative account, unless alternative arrangements are made for their disposal. On the other hand, the expense involved in completing registration is usually sufficient to deter the banker from proceeding further than to take a blank transfer with a memorandum. Apart from this the customer may not wish the securities to be transferred out of his name.

### Various Types of Stock Exchange Securities.

By reason of their comparative stability of value and almost unquestionable certainty of value, British Government Stocks.

such as Consols, Terminable Annuities, the various War Loans, Treasury and Exchequer Bills and Bonds, take pride of place as the most acceptable security from a banker's point of view. Certain of these are inscribed in the books of the Bank of England or of the Bank of Ireland, although, as already stated, they may in some cases be exchanged for stock certificates to bearer with coupons attached. In several cases the stocks may be either registered or inscribed, while others are issued only as registered securities. In a similar category are stocks guaranteed by the British Government, including Dominion Government Stocks, Irish Guaranteed Land Stocks, and Local Loan Stocks.

Second in order of preference may be placed the ordinary, preference or debenture stocks of the British Railway Companies, which are usually registered, fully paid up, stable in value, freely sold and transferable without difficulty or delay.

In the third class may be placed the ordinary, preference and debenture stocks of reputable British commercial and industrial undertakings, as, for example, the shares of the Imperial Tobacco Company, Courtaulds, Lever Bros., Furness Withy & Co. In all such cases the preference or debenture stocks are to be preferred to the ordinary shares, because the latter are more prone to fluctuation and therefore necessitate a wider margin being maintained by the banker to cover market price movements.

All other securities may be grouped into a fourth class, and should not be accepted by a banker unless the circumstances are exceptional and a very wide margin is available. Among these may be mentioned (a) *shares and stocks in foreign governments and undertakings*, which although they may be reasonably secure, may nevertheless be subject to fluctuations in value in consequence of movements in the rates of exchange; (b) *mining, oil and rubber shares*, which are also subject to considerable fluctuation by reason of their essentially speculative character and the vicissitudes to which the industries concerned are subject; (c) *local shares* may be reasonably stable in value and quite effective as a security, but as local buyers must usually be found for such shares they are not as readily saleable as the shares of ordinary undertakings.

### American Railway Share Certificates.

Certificates issued by certain American Railway Companies are peculiar in the fact that, although they are actually made out in the name of a registered holder, they are frequently indorsed on the back with a combined transfer and power of attorney which is signed in blank by the registered holder, thereby making the certificates transferable by mere delivery. Such shares held in this country are ordinarily registered in the name of a firm of agents in London, by whom the transfer is executed in blank and to whom all dividends on the shares are paid. The following is a specimen :—

---

**CENTRAL AMERICAN RAILWAY COMPANY.**

Messrs J. Ambrose & Son, of 117 Lombard St., London, E.C.2, are entitled to 200 shares of 10 dollars each in the capital stock of the **Central American Railway Company**, transferable in person or by attorney in the books of the Company only on the surrender and cancellation of this certificate by an endorsement thereof hereon, and in the form and manner which may at the time be required by the transfer regulations of the Company.

This certificate, however, is to be of no effect or validity until countersigned by the transfer agent and also by the registrar of transfers of the said Company in the city of New York.

In witness whereof, etc. :

---

**On the Back is Indorsed :**

For value received we do hereby sell, assign, and transfer to..... 200 shares of the capital stock of the Central American Railway Company of 10 dollars each, standing in our name, *James Ambrose & Co.*, on the books of the Company, and represented by the within certificate. And do hereby irrevocably constitute and appoint.....attorney to execute a surrender and cancellation of the within certificate and also to do all things requisite to transfer the said stock on the books of the said Company in such form and manner as may be necessary or be required by the regulations of the said Company in that behalf, with full power of substitution in the premises.

*James Ambrose & Co.*

17th June, 19..

The effect is, therefore, that although the certificates are made out in the name of one person or firm, they may subsequently pass through the hands of several transferees, any one of whom has the option of having himself registered as the holder of the shares. Unless the holder is so registered he cannot sue in his own name in respect of the shares, and the dividends have to be claimed by him from the registered holder. There is in such circumstances a risk that the holder's claim to the shares may be subject to a lien which the issuing company may have against the original holder, or may be subject to some prior charge or other equitable interest of which the holder has no knowledge. Accordingly, before accepting such shares as security, the banker should usually insist upon their registration in the name of the customer to whom he proposes to grant the advance. If, however, the shares are taken as security without registration, it should be seen that the transfer is properly executed in blank by the person described as the proprietor, and the banker's usual memorandum of deposit should be executed by the customer.

**LIFE POLICIES AS SECURITY.**

A life policy, either on the life of the customer himself or on the life of a third party, is another very common form of security against which advances are granted by bankers, in spite of the fact that such a security is subject to a number of important disadvantages. Mr F. E. Steele expresses the view that "despite some opinions to the contrary, the assignment of a life policy is

a good banking security when the life office is a well established and successful concern, and when the amount of the advance does not exceed the surrender value of the policy, which may be ascertained from the office".<sup>1</sup> Undoubtedly, life policies are frequently accepted in practice as cover for temporary loans, and especially as collateral security in cases where advances are granted against the deeds of property, documents of title, etc. A good policy is, of course, a security which increases in value as time goes on, with the added advantage that the full sum assured, with bonuses added (if any), is payable in the event of the borrower's death. Cases sometimes arise where the payment received in respect of a life policy on a borrower's death is sufficient to wipe off an overdraft and thereby obviate the necessity of realising other securities. Probably, it is as a collateral security that a life policy is of greatest value, while it is unquestionably necessary in circumstances where the success and pecuniary value of a customer's business or profession depend essentially on his own personal skill, knowledge and experience.

There are, however, a number of important precautions which must be taken before reliance can be placed on security of this kind. In the first place, the banker must ensure that the premiums are properly paid up and that future premiums will be paid as they fall due; secondly, it is necessary to have the age of the assured admitted by the company by separate letter or by endorsement on the policy, for if the age was understated at the time the assurance was effected, an adjustment of the sum ultimately payable by the company would be made. If necessary, a certificate of birth of the assured, or a certificate of baptism giving the date of the birth, should be forwarded to the company with the policy as evidence of the assured's age. If the policy is made out in the name of a woman who has since married, a certificate of marriage may also be required in order to establish the assured's identity.

Thirdly, the banker, for his own protection, should from time to time ascertain the surrender value of the policy from the company. Usually a life policy carries no surrender value until two or three consecutive premiums have been paid, but thereafter the value increases with the payment of each additional premium. In a *single premium* policy, i.e., where the risk is undertaken by the company in consideration of the payment of one premium only, the policy carries a surrender value of about 90 per cent. of the premium as soon as the latter is paid, the value increasing each year with interest, and bonuses (if any). Care should also be taken to distinguish between a *whole life* policy and an *endowment* policy, for whereas the former is payable only on the death of the assured, the latter is payable at the expiration of a certain term of years or on the previous death of the assured, and is therefore the more valuable. Again, it should

<sup>1</sup> *The Banker as a Lender*, p. 80.

be ensured that the policy does not arrange that reduced premiums shall be paid during the first years of its existence in order to accommodate the assured, for in such a case there may be no surrender value, or the surrender value will be too low to afford the banker any adequate protection. Finally, any life policy taken as security should be carefully perused to ascertain that it contains no special conditions or restrictions which may reduce its value as a security.

The disadvantages of a life policy as security are, in the first place, that the contract between the company and the assured is one of the "utmost good faith" (*uberrimæ fidei*), so that the company may avoid its liability if it can show that the assured, when he applied for assurance, did not disclose all material facts which might affect the acceptance of the risk by the company. Secondly, there is in some cases a risk that the policy may be avoided by the company if the assured commits suicide or dies by the hand of justice. The third drawback is that a life policy may be taken out by the assured with the express intention of providing for his wife and family, in which circumstances it may not be good for the banker's reputation in business if he has to claim the proceeds of the policy in satisfaction of his debt, and thereby leave the wife and family in need. In the fourth place, it must be noted that the value of the policy depends primarily on the continued payment of the premiums, so that if the assured allows these to lapse, the banker may be deprived of his cover unless he himself takes steps to pay the premiums as they fall due, in which case he will, of course, merely be adding to the amount already advanced.

Finally, it should be noticed that if the policy is taken out by a third party, and not by the person assured, the policy will be void under the Gambling Act, 1774, unless the third party has an insurable interest of a pecuniary nature in the life of the assured at the time that the policy is issued. A creditor or a guarantor has an insurable interest in the life of the debtor, provided the debt exists at the time the policy is obtained, and such creditor or guarantor can recover from the company even though the debt or obligation is afterwards extinguished. It follows that a banker may take out a policy on the life of any customer who is indebted to him, but as a rule the policy is effected by the debtor himself and is thereafter deposited with the banker as security in the manner described below. Similarly a wife has an insurable interest in the life of her husband and the husband in the life of his wife, but as a rule a parent has no such interest in the life of a child, or *vice versa*.

### Charge over a Life Policy.

A life policy may be taken as a security in two ways; (a) by mere deposit with a memorandum, in which case the banker

obtains an *equitable* mortgage; or (b) by *Deed of Assignment* to the banker, in which case the latter obtains a *legal* mortgage.

The first method has the advantages of cheapness and simplicity, for all that is necessary is that the policy should be handed to the banker together with a memorandum of deposit under hand or under seal, containing an undertaking by the assured to assign the policy if required to do so, while no formality is necessary when the advance is repaid other than the cancellation of the memorandum and the return of the policy to the assured. On the other hand, this method does not convey a full legal title to the banker such as is necessary to enable him to sue in his own name, while realisation of the value of the policy may be rendered difficult if the assured refuses to assist by giving the promised assignment. A life policy which is thus left with the banker with or without a memorandum of deposit cannot be claimed by the trustee on the bankruptcy of the borrower, unless the banker's claim is first satisfied.

It is more usual for bankers to adopt the second method and to take from the customer a full legal assignment of the policy. The *Deed of Assignment* conveys the policy to the banker by way of mortgage, subject to the assured's *equity of redemption*, and embodies an undertaking by the assignor to pay the premiums punctually and to lodge the receipts with the bank, in default of which the banker is given power to pay the premiums and to debit their amount to the assignee's account. The following is a form of assignment used by one of the large banks :—

#### ASSIGNMENT OF LIFE POLICY TO SECURE ASSIGNOR'S OWN LIABILITIES

**This Indenture** made the 10th day of *September* One Thousand nine hundred and ..... BETWEEN *James Brown, of 108 West Street, Northtown, Draper* (hereinafter called the "Assignor" which expression shall include his executors administrators and assigns where the context so requires or admits) of the one part and **NORTHERN BANK LIMITED** (hereinafter called "the Bank" which expression shall include their successors and assigns where the context so requires or admits) of the other part WITNESSETH that for the purpose of effecting the security hereby given the Assignor doth hereby as beneficial owner assign unto the Bank **ALL** that Policy of Assurance granted to the assignor on the life of the assignor, *James Brown*, by the *Northern Insurance Company Limited*, for the sum of *one thousand pounds* and which policy bears date the *1st day of May, 1907*, and is numbered *25761*,

and all money assured or to become payable by or under the same Policy and the full benefit thereof TO HOLD the same unto the Bank subject to the proviso for redemption hereinafter contained. PROVIDED ALWAYS that if the Assignor shall on demand pay to the Bank all and every sums and sum of money then due or owing to the Bank anywhere from or by the Assignor either solely or jointly with any other person or persons in partnership or otherwise and whether as principal or surety upon banking account or upon any discount or other account



or for any other matter or thing whatsoever including the usual banking charges the Bank shall at any time thereafter upon the request and at the cost of the Assignor reassign the said premises hereby assigned unto him or as he shall direct. AND the Assignor doth hereby covenant with the Bank that he will punctually pay the premiums and all other moneys which may become payable in respect of the said Policy and observe all the conditions necessary for keeping the same in force and that he will from time to time lodge with the Bank the receipt for such premiums at least seven clear days before the expiration of the days of grace allowed for payment of the said premiums. AND it is hereby agreed that if the Assignor shall make default in lodging the receipt for any such premium within such time as aforesaid the Bank may if they shall think fit so to do pay such premium and debit the account of the Assignor with the amount thereof. PROVIDED ALWAYS that it shall be lawful for the Bank at any time or times hereafter of their own absolute authority without the consent or concurrence of the Assignor to sell and surrender the said Policy moneys and premises to the said Assurance Society or absolutely to sell or otherwise dispose of the same to any other person or persons whomsoever by public auction or private contract and subject to such conditions or stipulations relating to the title or otherwise as shall appear expedient with full power to buy in or rescind or vary any contract for sale and to re-sell without being answerable for any loss to arise thereby and for the purposes aforesaid or any of them to execute and do all such assurances and things as they shall think fit and to receive the moneys to arise from the surrender sale or other disposition of the said Policy moneys and premises and out of the same moneys to pay or retain and satisfy all moneys due or owing on the security of these presents and all costs and expenses occasioned by the non-payment thereof or incidental to the execution of this power. AND the Assignor doth hereby further covenant with the Bank that the said Policy of Assurance is a valid and subsisting Policy and not forfeited or otherwise become void or voidable. PROVIDED ALWAYS and it is hereby declared and agreed that this security shall be a continuing security notwithstanding any settlement of account or other matter or thing whatsoever and shall be in addition and without prejudice to any other security or securities which the Bank may now or hereafter hold from or on account of the Assignor. AND IT IS HEREBY FURTHER DECLARED AND AGREED that the Bank shall in the event of their receiving notice that the Assignor has incumbered or disposed of his equity of redemption in the said policy moneys and premises or any part thereof be entitled to close the then current account and to open a new account with the Assignor and that no money paid or carried to the credit of the Assignor in such new account shall be appropriated towards or have the effect of discharging any part of the amount due to the Bank on the said closed account at the time when they received such notice as aforesaid.

In Witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written

Signed Sealed and delivered by the  
above-named *James Brown*,  
in the presence of *Henry White*,  
104 North Avenue,  
Northtown.

Clerk.

*James Brown*



It will be observed that the assignment gives the banker power to surrender or otherwise dispose of the policy without the assignor's consent in satisfaction of any claims against the person mortgaging the policy, whereas the assignor has a right to a reassignment of the policy on payment of the money due from him to the bank. A form of reassignment is usually indorsed on the deed of assignment and appears as follows :—

## REASSIGNMENT OF LIFE POLICY

**This Indenture** made the *7th* day of *January* One thousand nine hundred.....BETWEEN the within-named **NORTHERN BANK LIMITED** (hereinafter called "the Bank") of the one part and the within-named *James Brown* (hereinafter called the "Mortgagor") of the other part **WITNESSETH** that the Bank as Mortgagees do hereby assign unto the Mortgagor **THE** within-mentioned Policy of Assurance **TO HOLD** the same unto the Mortgagor discharged from all principal moneys and interest secured by the within-written Indenture. **In Witness** whereof the Bank have hereunto affixed their seal the day and year first above written.

The Deed of Assignment must be signed by any persons who are interested in the policy, either as assured or because the policy is taken out for their benefit. If in the latter circumstances it is necessary for a wife to execute the assignment, it is desirable that her signature should be witnessed by a solicitor acting on her behalf.

Section 3 of the Policies of Assurance Act, 1867, provides that the assignee of a life policy shall have no right to sue thereon unless proper notice of the assignment is given to the company at its principal place of business. It is therefore most important that a banker taking a legal assignment of a life policy should at once give notice of the assignment to the assurance company. For unless such notice is given the assured may surrender or otherwise deal with the policy, and the banker will be unable to claim thereon in his own name. The notice, which may be in the following form, should be sent in *duplicate*, and should be accompanied by the statutory fee of not exceeding 5s., in consideration of which the company must by Section 6 of the aforementioned Act acknowledge receipt of notice on the duplicate and return it to the banker.

**NOTICE TO ASSURANCE COMPANY OF ASSIGNMENT OF  
A LIFE POLICY**

**THE NORTHERN BANK LIMITED**

NORTHSIDE, N.W.

The Secretary,  
Diamond Assurance Co., Ltd.,  
London Wall.

1st May, 19..

DEAR SIR,

We hereby beg to give you notice that by indenture dated this day Mr John Jones of 4 Sackville Road, N.W., in the County of London has assigned to us his Life Policy No. 2307 for £100 in your company.

We should be obliged if you would acknowledge this intimation, and at the same time state if there be any prior charge on the policy registered in your books.

A postal order for 5s. is enclosed, in payment of your usual fee.

Yours faithfully,

**JAMES BROWN,**  
Manager.

By Section 3 of the Act referred to it is further provided that the claim of the assignee over the policy will date as from the time when the notice is received by the company, but the mere fact that notice is given will not enable the person giving notice to obtain priority over a person who holds a prior assignment if that person has omitted to give notice. On the other hand, it will be observed from the foregoing specimen notice that a banker seeks to protect himself as much as possible by requesting the company to give him information respecting any prior charges or assignments over the policy. There is, however, an exception to this rule in the case of a claim by the trustee in bankruptcy of the person assigning the policy, for such a trustee cannot obtain priority to the claim of a legal assignee for value of a policy merely because the latter has failed to give the company notice of his charge.

By obtaining from the company particulars of any existing charges or assignments over the policy the banker can ascertain whether the borrower has deposited with him all documents evidencing any prior charges over the instrument. It is most important that he should see that this is done, for all documents of charge relative to a policy necessarily form part of the title thereto, and unless they are carefully preserved for presentment to the company in due course, the company may refuse to pay over the amount due in respect of the policy unless certain lengthy formalities are completed.

On the reassignment of the policy by the banker to the assignor, notice of the removal of the banker's charge should be given to the assurance company in the following form :—

#### NOTICE OF REMOVAL OF CHARGE OVER LIFE POLICY

##### THE NORTHERN BANK LIMITED

NORTHSIDE, N.W.

26th December, 19..

The Secretary,  
Diamond Assurance Company, Ltd.,  
London Wall.

DEAR SIR,

I hereby beg to intimate that this bank has now no charge or claim whatever upon your Policy No. 2307, and dated 3th January 19.. upon the life of Mr John Jones.

I herewith withdraw the Notice served upon you on 1st May, 19..

Yours faithfully,

JAMES BROWN,  
Manager.

#### Receipt by Banker of Notice of a Second Charge.

If a banker receives notice of a second charge over a life policy which he holds as security, or of a further assignment of such a policy, he will of course take steps to ensure that the amount

of his advance is correspondingly restricted or additional security obtained. Moreover, if in such circumstances the loan granted by him is repaid, he should not reassign the policy to the borrower, but should hold it in trust for the person holding the second charge, or execute the reassignment in favour of that person.

### **Stamp Duty on Assignment of Life Policies.**

A memorandum of deposit of a life policy under hand requires stamping at the rate of 1s. per cent., but if the memorandum is under seal, it requires stamping with an impressed *ad valorem* stamp as a mortgage. An assignment by way of mortgage must also be stamped as a mortgage, while the stamp on the reassignment is at the rate of 6d. per cent. (see Chapter 26).

## CHAPTER 23

### PERSONAL SECURITY

THE term *personal security* is applied primarily to those classes of security which involve a right of action against the individual or individuals giving the security, in contra-distinction to securities which can be realised by sale or transfer, or which involve a right of action against a person who is entirely strange to the transaction between a banker and his customer, e.g., shares in a limited liability company. The principal forms of personal security are guarantees, promissory notes, bills of exchange and bonds.

#### Definition of a Guarantee.

A guarantee is defined as a contract whereby one person, called the *guarantor*, undertakes to be answerable for the payment of a debt or the performance of some act by another person, who must be legally bound to pay the debt or to perform the act concerned. There can be no contract of guarantee unless there is a prior contract in existence, upon which the principal debtor is liable to the party in whose favour the guarantee is given, i.e., the creditor, who is thus the beneficiary under both contracts. As a rule, the guarantor is liable in respect of his undertaking only if the principal debtor or the person guaranteed has made default, i.e., has failed to make due repayment, or to perform the necessary act. The contract of guarantee is therefore a *secondary* one, and becomes operative only on breach of the original contract by the principal debtor. And even if the guarantor fulfils his obligation and repays the creditor, the debtor is not discharged from his liability, but may be sued for repayment by the guarantor.

To the general rule that the guarantor is liable only in a secondary degree there is an exception that, if a person guarantees a debt or act of another person against whom there is no legal remedy,—as, for example, where the person guaranteed has no contractual capacity and cannot be sued on the debt incurred,—then the guarantor will himself be *personally* liable in any event. Thus, a person who guarantees the due repayment of a debt contracted by an infant will be personally liable if the creditor cannot exercise any legal remedies against the infant. This was illustrated in the case of *Wauthier v. Wilson*, 1912, where a joint and several promissory note was signed by a father and his son

in respect of money advanced to the son, who was a minor. It was held by the Court of Appeal that the father was primarily liable in respect of the debt.

### Form of a Guarantee.

The form in which a guarantee is given is of vital importance, particularly to a banker, who needs to be protected against a number of contingencies which may affect his relations with the customer and the guarantor. In the first place, a guarantee must be *in writing*, for by virtue of Section 4 of the Statute of Frauds, 1677, no action can be brought to charge a person upon any promise to answer for the debt of another person unless the agreement upon which the action is brought, or some memorandum or note thereof, is in writing, signed by the person to be charged with the guarantee or his legally authorised agent. As a rule, guarantees taken by bankers are comprehensive in form, being drawn up by the banker's solicitors, but in order to be enforceable the instrument must contain at least the names of the parties, the signature of the surety, and the essential terms of the contract. A statement of the consideration need not be given, but in a banker's guarantee the consideration is usually stated to be an agreement by the banker at the guarantor's request not to require immediate payment of the money due from or owing by the debtor. Sometimes, however, the consideration is stated to be the granting of an advance of money to the customer, or the opening or continuing of the debtor's account, or it may consist merely in the giving of time to the debtor in which to pay a sum borrowed.

The following is a form of guarantee used by one of the large banks. It may, of course, be varied to suit the circumstances of the case, as, for example, where the document is to be signed by more than one guarantor, or is to be given on behalf of a registered company, society, or partnership.

#### GUARANTEE BY ONE SURETY FOR THE LIABILITIES OF AN INDIVIDUAL

#### TO THE NORTHERN BANK LIMITED

IN consideration of your agreeing at my request not to require immediate payment of such of the sums mentioned below as may be now due and in consideration of any like sums which you may hereafter advance or permit to become due I the undersigned *James Brown, of 21 St Mary's Street, Northtown, Accountant*, hereby guarantee to you the payment three days after demand made upon me of any sum or sums of money which may be now or may hereafter from time to time become due or owing to your Bank anywhere from, or by *Thomas Robinson, Draper, of 115 Western Road, Northtown*, his executors or administrators (who are all hereinafter referred to as "the said Debtor") either solely or jointly with any other person or persons in partnership or otherwise upon Banking account or upon any discount or other account or for any other matter or thing whatsoever including the usual banking charges

Any demand under this guarantee shall be considered as having been duly made if sent by registered post addressed to me at my address as above given or at such other address within the United Kingdom as I shall give you notice in writing as to be substituted therefor

This guarantee is to be a security for the whole amount now due or owing to you or which may hereafter from time to time until the expiration of the notice hereinafter mentioned become due or owing to you by the said Debtor but nevertheless the total amount recoverable hereon shall not exceed *Two hundred* pounds in addition to such further sum for interest and other banking charges and for costs as shall accrue after the date of demand by you upon me for payment. This guarantee is to be in addition and without prejudice to any other securities which you may now or hereafter hold from or on account of the said Debtor and is to be binding on me my estate and effects as a continuing security notwithstanding any settlement of account or my being under disability or my death until the expiration of one calendar month from the time when you shall receive notice in writing to the contrary from me my executors administrators or legal representatives

You are to be at liberty in the event of this guarantee ceasing from any cause whatsoever to be binding as a continuing security on me my estate or effects to open a fresh account or accounts and to continue any then existing account or accounts with the said Debtor and no moneys paid from time to time into any such account or accounts by or on behalf of the said Debtor and subsequently drawn out by the said Debtor shall on a settlement of any claim under this guarantee be appropriated towards or have the effect of payment of any part of the moneys due from the said Debtor at the time of this guarantee ceasing to be so binding as aforesaid unless the person paying in such moneys shall at the time direct you in writing specially to appropriate the same to that purpose

It is hereby agreed that any admission or acknowledgment in writing by the said Debtor or by any person authorised by the said Debtor of the amount of his indebtedness or otherwise shall be binding and conclusive on me my executors and administrators in all courts of law and elsewhere

You are to be at liberty without thereby affecting your rights hereunder at any time to determine or vary any credit to the said Debtor to vary exchange or release any securities held or to be held by you from or on account of the said Debtor to renew bills or promissory notes in any manner and to compound with give time for payment to accept compositions from and make any other arrangements with the said Debtor or any obligants on bills notes or securities held or to be held by you from or on behalf of the said Debtor. And in case of bankruptcy liquidation by arrangement or composition with creditors any dividends you may receive from the estates of the said Debtor or others shall not prejudice your right to recover from me my executors or administrators to the full extent of this guarantee any sum which after the receipt of such dividends may remain owing to you by the said Debtor

As Witness my hand this 11th day of August, One thousand nine hundred and

Signed by the above-named

James Brown

in the presence of

William Black,

10 Brunswick Avenue,  
Northtown.

Clerk.

James Brown.

It will be observed that the document aims as far as possible at safeguarding the banker against all possible contingencies, and that it is designed to cover any kind of transaction between the banker and the customer. The guarantee provides that the contract shall not be prejudiced if any other securities are taken from the debtor, nor by any arrangements made with the debtor regarding the exchange or release of securities, or for the giving of time in which to pay. Moreover, the agreement provides that it shall be a *continuing* security, thus protecting the banker against the operation of the Rule in Clayton's case on the death

or bankruptcy of the debtor, or, in the case of a firm, on a change in its constitution, and also that, in the event of the bankruptcy of the customer, the banker shall be at liberty to recover from the guarantor the *full* amount for which he agrees to be liable less any dividends received. Finally, it will be noted that the guarantor promises repayment of the sum or sums owing to the banker *three days after demand*, such demand being duly made if sent to the guarantor at his last known address by registered post.

Clearly, such a document well fulfils the main object of a guarantee, which in Sir John Paget's words, is "to keep a free hand for the bank and a tight one on the guarantor". There are, however, limits to the degree to which a bank can require a guarantor to bind himself, and, if the terms of the agreement are such that the banker can be held to impose upon the surety obligations which should properly rest upon the principal debtor, the guarantee may be invalid and the guarantor may not be bound. But a guarantor cannot claim to be absolved from liability merely because he has misinterpreted the terms of a guarantee signed by him, provided there is no misrepresentation on the part of the banker or the debtor guaranteed.

### Stamp on a Guarantee.

A guarantee under hand should be stamped as an agreement with a 6d. adhesive or impressed stamp. If the stamp is *adhesive* it must be affixed and cancelled at the time the document is signed by the guarantor, but an *impressed* stamp may be affixed at any time within 14 days of the date of execution. A guarantee under seal requires a 10s. impressed deed stamp; the stamp being impressed within 30 days of execution. It sometimes happens that a banker has to rely upon an informal letter or other document as a guarantee for an advance,—as, for example, where a third party writes to say that he will accept liability for the debt, but it is not possible to obtain his signature to a formal document of guarantee. In such circumstances the banker should have the letter or other document stamped with an impressed stamp as soon as it is received, and, provided the stamp is affixed not later than 30 days after the date of the letter, the document will be valid as a guarantee.

### Guarantee Distinguished from an Indemnity.

It is important to note that there are essential differences between a contract of guarantee and a contract of *indemnity*. In the first place, a guarantee must be evidenced by writing, whereas an indemnity needs no such authentication. Secondly, a guarantor is liable only in a *secondary* degree, that is, he must pay only if the principal debtor fails to do so, whereas in the case



of an indemnity the promisor is *primarily* liable. In other words, the liability in the case of a guarantee is *contingent* only on the default of another person, whereas in the case of an indemnity the liability is *direct*. Thirdly, indemnity involves only one contract, whereas guarantee or suretyship involves two distinct contracts, in each of which the creditor appears as a party.

For example, if Brown says to Robinson "Lend Jones £50 and, if he does not pay you, I will," there is a contract of guarantee; but it cannot be enforced unless it is evidenced by writing signed by the person making the statement. On the other hand, if Brown says to Robinson, "Advance Jones £50 and charge the amount to me", there is a contract of indemnity, which need not be evidenced by writing if it can otherwise be proved that Brown actually made the statement.

Similarly, a contract whereby a *del credere* agent, for an additional commission undertakes to be personally liable for the purchase price of goods sold by him for his employer, or to be answerable for the solvency of the purchasers, is not a guarantee but an indemnity, and therefore does not require to be evidenced by writing. If an indemnity is given under hand or under seal, as is frequently the case when documents are lost, it will require stamping in the same way as a guarantee with a 6d. impressed or adhesive stamp if under hand, or with a 10s. impressed deed stamp if under seal, the stamp in the latter case being impressed within 30 days of the execution of the document.

A guarantee must also be distinguished from a contract of *novation*, i.e., an agreement between the creditor and a third party whereby the creditor agrees to release the debtor from his liability on the third party agreeing to pay the debt. Thus if James Brown owes Thomas Robinson £100, and a third party, William Thompson, agrees to pay the £100 if Robinson will free Brown from his liability, there is a novation of the original contract or agreement. In such circumstances, the third party becomes the principal debtor, primarily liable for the debt, and not merely liable in a secondary degree if the principal debtor does not pay, as in the case of a guarantee.

### The Value of a Guarantee.

As a guarantee involves a personal right of action by the creditor against the guarantor in respect of the amount due, it is obvious that the value of such security depends essentially on the standing and worth of the guarantor, and on his ability to pay the amount of the advance, conveniently and without difficulty, not only at the time when the contract is signed, but also for the whole time during which the guarantee is relied upon by the banker. It follows, therefore, that in accepting a guarantee as security, the banker's first duty is to ascertain carefully whether

the proposed guarantor can be relied upon for the amount which he undertakes to pay.

If the guarantor is a customer of the branch accepting him as a surety, no difficulty should be experienced in forming a true estimate as to his worth, but if the proposed surety is a customer of another branch or bank, a confidential enquiry must be made in order to determine whether he can be relied upon for the amount. And even when this is done, and the enquiries are satisfactorily answered, the banker should at regular intervals take the necessary steps to satisfy himself that the guarantor is still to be relied upon. Particulars of all information so obtained are recorded on specially prepared enquiry or *opinion cards*, which are filed away in order according to the date upon which the enquiry should be renewed, and are kept under the personal supervision of a senior official at each branch. As a rule, opinions are renewed at least once a year, but they should, of course, be obtained more frequently if it appears to be desirable to do so. As each opinion is received a note thereof, with the relative date, is recorded on the card, but if the information is not satisfactory, steps must be taken by the banker to obtain additional security or the signature of another guarantor, or to demand repayment of the advance from the principal debtor if such a step appears to be necessary.

As a rule, a banker should not place too great reliance on guarantees by persons with limited incomes terminable at death, or by members of the lower professional classes whose incomes are ordinarily terminable at death or on their ceasing to be employed.

Unless the banker so desires, he need not, of course, accept any person suggested by the debtor as a surety for an existing or proposed advance; while even if a properly executed document of guarantee is offered to the banker, it does not become binding on the surety until the banker signifies his acceptance. Moreover, the guarantor may revoke his offer to accept suretyship at any time until it is accepted by the creditor, for in respect of a contract of guarantee, as in any other contract, there must be a clear offer and a definite acceptance if the parties are to be legally bound.

### **Validity of a Guarantee: Misrepresentation.**

For his own protection and to avoid subsequent difficulty, a banker should always take steps to explain to a new guarantor the exact nature of the contract into which he is entering, and to define precisely the liabilities which he assumes. Moreover, it is of the utmost importance that the guarantee should be signed by the surety of his own free will, and without any pressure or coercion either on the part of the banker or of the debtor.

Any enquiries addressed to the banker by a proposed surety

relative to the position and dealings of the debtor should be answered fairly and openly. But a contract of guarantee does not fall within the class of contracts described as *uberrimæ fidei*, i.e., those which require a full disclosure of all material facts by the parties. Hence it is no part of the banker's duty to disclose the actual state of the debtor's account, or to volunteer information concerning the debtor's affairs or business habits, unconnected with the contract of guarantee, which might have the effect of impelling the surety to revoke his offer to accept liability. Thus, in *National Provincial Bank v. Glanusk*, 1913, it was held that a guarantee was not invalidated because the bank did not disclose to the guarantor that it had suspicions that he was being defrauded by the debtor.

On the other hand, the surety may escape liability if he can show that the facts of the case have been fraudulently misrepresented to him, either by the bank itself or by the debtor, acting as the bank's agent to get the document signed, as may arise if a guarantee is handed to the debtor by the bank with instructions to obtain the signature of the surety. In such circumstances, the debtor will be regarded as the bank's agent for the purpose of obtaining the signature of the guarantor, so that the latter may avoid liability under the agreement if he can show that the position was misrepresented by the debtor, or that his signature was obtained by fraud.

### Validity of a Guarantee: Signature.

A banker should, therefore, safeguard himself by ensuring, as far as possible, that all guarantees are signed on the bank premises after their terms have been properly explained by the bank manager or other responsible official. This is of first importance in the case of guarantees given by women, who, by reason of the fact that they are not deemed to have the necessary acquaintance with business affairs, may evade liability on a guarantee by pleading that it was signed under pressure, coercion, or undue influence. It is always a wise precaution to insist that a guarantee by a woman shall be signed by her in the presence of her solicitor, who should witness the document. As a further safeguard, her signature should be obtained to a "free will clause," i.e., a declaration that she signs of her own free will and with full knowledge of the nature of the transaction. This is of particular importance where the principal debtor is the husband, and it is sought to hold the wife liable as a guarantor to the extent of her separate estate.

If it is not possible to obtain the personal attendance of the guarantor at the branch in order to execute the guarantee, arrangements should be made, if he resides in the same town, for his signature to be affixed in the presence of a responsible official of the bank. But if the guarantor resides in another

town, the document should be forwarded to a branch or correspondent in that town with instructions that the guarantor's signature be obtained in the presence of a competent witness. It is assumed, of course, that any such branch or agent will take the necessary steps to explain the purport and significance of the document to the guarantor.

### Power to give Guarantees.

Special precautions are required in the case of guarantees given by partnerships and joint stock companies. In the case of a company, every care must be taken to ensure that it has power to undertake such a liability, otherwise the company will not be bound.

A banker who is offered a guarantee signed by a joint stock company should take precautions to ascertain whether power to give guarantees is conferred on the company by its memorandum of association. In the absence of an express provision to this effect, such an agreement signed by the directors will be *ultra vires* the company and therefore not enforceable against it, although the guarantee may be enforceable against the directors *personally*. Directors who give a guarantee without having authority to do so may also be held personally liable for breach of an implied warranty of authority.

It cannot be implied as being within the powers of any one partner to give a guarantee in the name of his firm, so that, unless there is an express provision to the effect in the articles of partnership, or a separate express authority given by all the other partners, all the partners in a firm should be required to join in signing a guarantee given on its behalf. Particular care is necessary if the instrument is executed under seal, for an individual partner has no power to bind his firm by deed unless he is *expressly* authorised to do so by authority given by all the partners under seal.

A guarantee signed on behalf of a partnership should expressly provide that it will not be affected by any change in the constitution of the firm: otherwise, on the death, bankruptcy, retirement or admission of a partner, the contract of suretyship will be revoked as to any *future* advances, though the firm will still be liable for past advances. Apart from these considerations, it must be remembered that a guarantee given by a partnership may be seriously affected if the financial position of the firm is prejudiced by the death or withdrawal of a partner owning a considerable proportion of the capital, or of a partner upon whose skill or reputation the business largely depends.

### Validity of a Guarantee: Material Alteration.

The validity of a guarantee may also be affected if any material alterations therein have not been properly assented to

and initialled by all persons signing the instrument, for if any party sought to be charged can show that material alterations have been made without his consent, he may avoid liability under the agreement. This point is of particular importance if several parties joining in the giving of a guarantee undertake to be liable for different amounts. In such cases the initials or signatures of *all* the guarantors should appear as near as possible to the amounts for which each respectively agrees to accept liability, and no alteration in such amounts should thereafter be permitted without the consent in writing of *all* the persons signing the instrument.

### Guarantees and the Rule in Clayton's Case, 1816.

The Rule in Clayton's Case, 1816, referred to on page 169 *ante*, is of considerable importance in connection with guaranteed accounts, for in the absence of express agreement that a guarantee is to be *continuing*, every credit paid in by the debtor after the date of a guarantee will have the effect of reducing *pro tanto* the liability of the surety, while every debit to the account after the giving of the guarantee will form a new overdraft for which the surety is not liable.

In the absence of express agreement, the Rule will also operate in the surety's favour and to the prejudice of the bank on the happening of any event which alters the contractual status and relationship of the parties, as, for example, on the death, bankruptcy or insanity of the principal debtor, or on a change in the constitution of a partnership by whom or in whose favour a guarantee is given, or on the amalgamation of a joint stock company by whom or to whom a guarantee is given. In any of such events the banker should at once stop the relative account and open a new one, communicating with both the debtor and the surety, and, if he deems fit, passing any new transactions through a new account in the debtor's name. If necessary, arrangements should be made for the repayment of the advance, or for the signing of a new guarantee, as the case may require.

### The Effect of a Continuing Guarantee.

In view of these considerations, guarantees nowadays taken by bankers are almost invariably *continuing* guarantees, that is to say, they are so drafted that the guarantor is held liable for the fluctuating balance at any time owing on the debtor's account during the continuance of the guarantee, subject to any limit which may be specified. The object of this is to ensure that the guarantor shall be held liable for the *ultimate* balance due by the debtor when repayment is demanded by the banker, or when it becomes necessary to determine the balance due by the surety under the terms of the guarantee. The term "ulti-

mate balance" for this purpose does not mean that the banker will demand repayment from the surety as soon as the limit agreed in the guarantee is reached on the debtor's account, but it implies that, when any event occurs upon which the debt becomes repayable, or if the guarantor gives notice to terminate his liability, the balance due by the debtor shall be ascertained, and the guarantor shall be held liable to the agreed extent.

As a rule, all continuing securities specifically provide that the surety's liability shall continue until *the expiration* of one calendar month (or other period) from the time when notice to terminate the guarantee is given by the surety or his *personal representatives*. The effect of this is that the guarantor, or his estate in the event of his death or bankruptcy, can be held liable for the payment of any outstanding cheques or for any liabilities of the principal debtor entered into before notice was given but which accrue during the period of notice, thus enabling the banker to complete or fulfil any obligations incurred by him on the debtor's behalf in reliance on the guarantee. One eminent authority holds that, even where such a clause is inserted, the banker is not safe in making any further *voluntary* advances up to the limit of the guarantee after receipt of the notice,<sup>1</sup> hence some banks in practice rule off the debtor's account on receiving notice from the guarantor, and carry all future transactions (if any) to a new account. The provision that notice shall be given by a guarantor or his representatives in order to determine his liability is then regarded as being solely for the purpose of giving the banker an opportunity of winding up outstanding transactions, while also operating to prevent the sudden determination of the guarantor's liability, either by notice or by death, to the consequent prejudice of the interests both of the banker and of the debtor.

A continuing guarantee in the form here discussed is not necessarily determined by the death of the guarantor; legally it will continue until the requisite notice to terminate the guarantee is given by the personal representatives of the deceased.<sup>1</sup> But unless it is expressly provided that such notice shall be given, the liability of the guarantor's estate is at once determined when the bank receives notice of his death, in which case the debtor's account should be ruled off and the legal representatives of the deceased surety advised of the amount of his liability.

Upon receipt of notice from the surety or his representatives to determine a continuing guarantee, the banker should at once advise the debtor customer, informing him, if necessary, that whilst outstanding cheques will be paid, no further advances can be granted against the existing security. The notice for this purpose should be sent in writing by registered post, so that a receipt may be obtained and retained as evidence that due notice has been given to the customer.

<sup>1</sup> See, however, note on page 635.

### The Clause for Notice.

It will be clear from the foregoing explanation that particular care should be taken by a banker in wording his clause for notice in a guarantee, for unless the clause specifically provides that the guarantee is to continue in force until the *expiration* of the notice, the banker may be involved in difficulty even in respect of the completion of outstanding transactions. Thus it is undesirable to provide that the guarantee is "to continue until *terminated* by one month's notice", for in such a case it may be held that the guarantee absolutely comes to an end at the time notice is given, and the banker may have difficulty in completing transactions entered into on the faith of the guarantee prior to the receipt of notice, although in equity he would probably be held to be justified in so doing. In any event, it is certain that a surety under a guarantee so worded is entirely free from liability for any future *voluntary* advances made by the banker after he is given notice to terminate the guarantee.

If, therefore, a banker is not covered by an effective clause for notice in his guarantee, or if the guarantee does not provide at all for notice, his only safe course, on receiving an intimation from the surety that he wishes to terminate his liability, is at once to stop the relative account and inform the debtor. Any outstanding cheques can be paid only at the banker's own risk, for as soon as notice is received from the surety, the Rule in Clayton's case will operate in his favour.

### The Effect of a Specific Guarantee.

A continuing contract of suretyship must be clearly distinguished from a *specific* or *non-continuing* guarantee, in which the surety undertakes to be answerable only in respect of a specific transaction or in respect of a fixed amount, as, for example, a definite advance granted to a debtor on loan account. Such a guarantee cannot be revoked at any time by the surety until the loan is repaid and the debtor's liability extinguished, but, when this is done, the agreement becomes void and cannot be applied by the banker in respect of any future advances. Thus if a guarantee is given in respect of an advance of £1000, which is debited to loan account and credited to current account in the name of the debtor, the money is advanced once and for all, and the surety is liable for the *whole amount* notwithstanding that only a part thereof may have been withdrawn by the debtor. Consequently, a banker cannot refuse to honour cheques drawn by a customer merely because he has received notice from the surety that he wishes to put an end to his liability.

In general, a *bond* or promissory note given to secure an advance is regarded as a non-continuing or specific security, so that such a security will not effectively protect a banker in respect

of fluctuating balances on current account unless it is accompanied by a memorandum explicitly setting forth the terms and purpose of the deposit.

Another form of guarantee is one which is given for a *specified period*. Such an agreement may be withdrawn at any time within the period on the guarantor giving notice to the banker and repaying any money then due from the debtor. The banker is, however, justified in completing any outstanding transactions and in paying any outstanding cheques presented after receipt of the notice. He should also be indemnified in respect of any current bills accepted by him on the customer's behalf prior to the receipt of notice of withdrawal from the surety, provided that the terms of the guarantee are such that they will cover such acceptances. But further voluntary advances can be granted by the banker only at his own risk.

On receipt of the notice, or at the expiration of the period for which the guarantee is given, the relative account should be stopped, and the debtor and the guarantor at once advised of the amount due on the relative account. If it is desired to continue such a guarantee for a further period, either an entirely new agreement may be taken, or the expired guarantee may be indorsed with a duly stamped agreement, signed by the guarantor, that it shall continue for the further period specified.

### Limit to the Surety's Liability.

In most guarantees it is specifically stated that the surety's liability in respect of the debtor's obligation shall be limited to a stated amount, as is the case in the specimen guarantee given above. In addition, it is almost invariably provided that the liability of the surety shall extend to any banking charges and other costs which may accrue in reference to the debt, either before or after the date of demand for repayment. But although it is usually expressly provided that the amount *recoverable* from the guarantor shall not exceed a specified sum, the guarantee is nevertheless expressed to be a security for the *whole* amount which may be advanced, paid or incurred by the banker on the debtor's behalf. The object of this is to ensure that, in the event of the customer's bankruptcy, the banker shall, if it is at all possible, receive in repayment the full amount of the debt due to him by the customer.

By virtue of such a provision, the banker may prove against a bankrupt customer's estate for the whole amount due, without deducting any payment made by the surety and without deducting the value of the guarantee, subject, however, to his not receiving in all more than 20s. in the £1. The effect may be illustrated in the case of two overdrafts for £400, one secured by a guarantee for £200 only, and the other by a guarantee for the *whole* amount but with a limit of £200. In both cases the surety



must pay £200, but whereas in the latter case the bank can prove in the customer's bankruptcy for the whole amount of £400, in the former case it can prove only for the balance after deducting the amount recovered from the surety, i.e., £200 only. Accordingly, if the dividends received amount to 10s. in the £1, the bank would obtain £400 in the second case, but only £300 in respect of the first overdraft.

A further effect of the provision referred to is that the banker can retain as against the surety any securities of the debtor which may be in his hands until he has obtained repayment in full, and the fact that the surety has paid the amount outstanding under the guarantee does not entitle him to the benefit of any securities of the debtor in the banker's possession, so long as the bank's claim remains unsatisfied.

But even if the guarantor undertakes to be liable for the whole debt due to the banker, it is usual for the latter to safeguard himself by a provision similar to that contained in the last clause in the specimen guarantee reproduced on pages 610-611, whereby it is provided that the bank's right to recover from the guarantor to the full extent of the guarantee shall not be prejudiced by any dividend received from the bankrupt debtor's estate.

### Joint and Several Guarantees.

In the event of more than one person undertaking liability for the repayment of a debt, the guarantors may be liable either *jointly*, i.e., together as co-sureties, or *severally*, i.e., each guarantor individually liable for the whole of the debt, or both *jointly and severally*. In a joint guarantee the guarantors must be sued together for the full amount of the debt if a complete remedy is to be obtained, for, although each surety is fully liable for the whole amount due, an unfruitful action brought against any one of several joint guarantors will result in the discharge from liability of the remaining joint guarantors. Moreover, if one of several joint guarantors dies his estate is freed from liability, and the obligation to repay the debt devolves upon the surviving surety or sureties. On the other hand, a *several* guarantee enables the banker to sue any one of the sureties separately for the whole amount of the debt, subject to any limit specified in the guarantee, while the fact that judgment against one of two or more *several* guarantors is unsatisfied, does not prevent proceedings being taken against any or each of the others until complete satisfaction is obtained. Moreover, the death or bankruptcy of one of a number of guarantors who are *severally* liable does not release the estate of the deceased or bankrupt guarantor from liability.

In practice, all bankers' guarantees taken from more than one person are both *joint and several*, so that the banker may proceed against any of the sureties, or against some or all of

them as he deems fit, until the whole of his debt has been repaid. The remedy against joint and several guarantors is thus a cumulative one, whilst at the same time giving the banker the option of proceeding against any single guarantor who can be relied upon as having the means to repay the whole of the debt. If one of several joint and several sureties thus repays the amount due, his remedy is to proceed against his co-sureties for a proper contribution, or he may, on being sued, insist upon their being joined with himself in the action. But if one of such sureties repays the debt, or is released by the creditor, the others are all discharged. On the death or bankruptcy of a party to a joint and several guarantee, the estate of that party remains liable for the repayment of any debt contracted under the guarantee before the happening of the event concerned.

**GUARANTEE FOR THE LIABILITIES OF A REGISTERED  
COMPANY OR SOCIETY**

**TO THE NORTHERN BANK LIMITED**

**I**N consideration of your agreeing at our request not to require immediate payment of such of the sums mentioned below as may be now due and in consideration of any like sums which you may hereafter advance or permit to become due we the undersigned

*James Brown, 21 St Mary's Street, Northtown, Draper,  
Henry Thompson, 107 Western Road, Northtown, Solicitor,  
William White, "The Laurels", Millstone Lane, Northtown, Gentleman,*

hereby jointly and severally in our private and individual capacities guarantee to you the payment three days after demand made upon us of any sum or sums of money which may be now or may hereafter from time to time become due or owing to your Bank anywhere from or by *The Northern Trading Company, Limited* (hereinafter called the said Debtors), or which if there were no limit to their borrowing powers would be now or would hereafter from time to time become due or owing to your Bank from or by the said Debtors either upon Banking account or upon any discount or other account or for any other matter or thing whatsoever including the usual banking charges and either solely or jointly with others in partnership or otherwise

[Here follow three clauses similar to clauses 2 and 3 in the specimen on pages 610-611.]

This guarantee shall be taken to include and shall extend to all moneys heretofore or hereafter lent paid or advanced by you in any way for or on account of or apparently for the purposes of the said Debtors at the request or instance of or by honouring the cheques drafts bills or notes or obeying the orders or directions of any of the Directors Managers or Officers or persons appearing to be or acting as Directors Managers or Officers for the time being of the said Debtors and you shall not in any way be prejudiced or affected by the want of borrowing powers on the part of the said Debtors or of their Directors Managers or Officers or by any excess in the exercise of such powers (if any) And all moneys so lent paid or advanced as aforesaid shall be held and taken to be money due to you from the said Debtors within the meaning of this guarantee and this whether the same shall be recoverable by you from the said Debtor or not

[Here follow three clauses similar to the last three clauses in the previous specimen guarantee.]

This guarantee shall remain binding as such continuing security as aforesaid and otherwise notwithstanding any changes which may from time to time take place in the name members shareholders or constitution of the said Debtors by incorporation or otherwise

**As Witness, etc.**

When a joint and several guarantee is taken, the banker should exercise the same precautions in respect of each surety as would be taken in the case of a sole guarantor. In addition, he should ensure that no part of the advance is granted until all those who have agreed to be liable have signed the contract of guarantee, and have properly initialled any alterations or additions to the document. Otherwise, if one or some of several persons who have agreed to become liable refuse to sign, the sureties who have already signed may evade liability on the ground that their guarantee was given only on condition that all the other parties joined in the agreement. In such circumstances, the banker should either obtain the signatures of the remaining sureties to a new guarantee, or arrange for other parties to be substituted for those who have failed to sign.

### Circumstances in which a Guarantee is Determined.

A guarantee is determined either (i) *at the will of one or some of the parties*, i.e., (a) repayment by the principal debtor, (b) repayment by the guarantor; and (c) demand for repayment by the banker; or (ii) *by operation of law*, e.g., on the death, bankruptcy or insanity of the surety or principal debtor, or on a change in the constitution of a firm if the guarantee is given to or in favour of a partnership, or on the amalgamation of a company if the guarantee is given by or to a joint stock company.

**REPAYMENT.**—In the ordinary course of events, a guarantee is determined and the surety discharged when the advance in respect of which the guarantee was given is paid off by the principal debtor, the agreement being thereupon cancelled by the banker and surrendered to the surety. Similarly, a guarantee will be terminated if the surety pays the whole amount for which he is liable under the guarantee, subject usually to the banker's right under the terms of the agreement to hold the surety liable in respect of any accruing liabilities undertaken by the bank in reliance on the guarantee, as, for example, unmatured acceptances on behalf of the customer. If notice is properly provided for in the agreement, the bank will be adequately safeguarded in respect of incompleting transactions by insisting upon the agreed notice.

**DEMAND FOR REPAYMENT.**—On his part the banker may determine a guarantee by giving notice to the debtor and also to the surety that he requires payment of the advance. As to whether notice will be required before the account is stopped will depend on the circumstances of the case, but if the banker has agreed to advance up to a specified amount, he cannot without proper notice suddenly dishonour his customer's cheques and thereby injure the customer's credit. The banker can, however, forthwith proceed against the surety if the debtor does not within a reasonable time comply with the banker's request to

repay the debt, and most bank guarantees now provide that repayment shall be made by the surety two or three days after demand. Legally, such a demand on the surety may be made without any prior application to the principal debtor for repayment, and the banker is under no obligation to realise any securities of the debtor which are in his hands before resorting to the guarantor. In practice, however, an application for repayment to the customer guaranteed would almost invariably be made before recourse was had to a guarantor, for no banker can afford to ignore the fact that a surety who is compelled to pay up rarely remains a good friend to the bank.

**DEATH OF SURETY OR DEBTOR.**—The most important circumstances in which a guarantee is affected by operation of law are (a) the death of the surety, and (b) the death of the principal debtor. The actual legal position of the banker on the *death of the surety* is not altogether clear, but it would appear that, even if there is no provision to cover the point in the agreement, a contract of guarantee is not immediately terminated by the death of the surety. Nevertheless, it is unlikely that a bank could hold the estate of a deceased surety liable in respect of voluntary advances granted by the banker after receipt by him of express or constructive notice of the death.

As a rule, the position of the banker is safeguarded by a stipulation in the guarantee to the effect that the requisite notice must be given to terminate the agreement either by the surety himself during his lifetime, or by his personal representatives, in the event of his death. In such circumstances there is no need to stop the account until the necessary notice is received, but if the contract of guarantee does not expressly provide for the liability of the estate of a surety on his decease, the relative account should be at once stopped on receipt of notice of a guarantor's death, and all future transactions passed through a new account in the name of the customer. Moreover, if such notice is not given by the representatives, a banker will usually protect himself by informing the personal representatives of the existence of the guarantee.

*Notice of the death of the principal debtor* necessarily puts an end to the account between him and the banker, and therefore operates automatically to determine the guarantee. In such circumstances the account should be stopped, and a formal demand should be made on the guarantor for repayment, although, of course, it may not be necessary to enforce such a demand if full payment of the debt can be obtained from the deceased's estate, or if the banker holds life policies or other securities sufficient to cover the amount advanced. The guarantor can be held liable only in respect of the amount due or accruing due to the bank on the date of the receipt by the bank of notice of the death, and he cannot be required to recoup the bank for any voluntary payment made after receipt of such notice.

**BANKRUPTCY OF SURETY OR DEBTOR.**—A contract of guarantee is at once determined by the bankruptcy of the surety or of the principal debtor. On receipt of constructive or express notice of the *bankruptcy of the surety*, the banker should immediately stop the relative account, and claim repayment of the loan from the principal debtor. If such repayment cannot be obtained, the banker should enter a claim against the guarantor's estate, but in doing so he must take into account any part payment received from the principal debtor, although he need not value any securities of such debtor in his hands which have not been realised. The liability of a guarantor under a guarantee is entirely discharged when he receives his discharge in bankruptcy.

A guaranteed account must also be stopped as soon as the banker receives actual or constructive *notice of the debtor's bankruptcy*. In such circumstances, a demand for repayment should be made to the guarantor, who should be informed that interest will run against him on the outstanding balance from the date of demand until the date of settlement. Any amount received from the guarantor should be credited to a separate account until such time as the affairs of the principal debtor are wound up, and if the amount paid by the surety under the guarantee does not entirely wipe off the debt due to the bank, the banker should enter a claim against the debtor's estate for the *full amount* of the advance, assuming, of course, that he is enabled to do this by the terms of his guarantee, as is almost invariably the case nowadays. (See above.) If he is thus protected, the banker in making his claim need not deduct from his proof any amount received from the guarantor, neither need he value any security *deposited by the guarantor* in respect of the debt, for he may regard any such security and also the guarantee as a *collateral* security. This rule is based on the principle that, even if the security were given up by the banker, the estate of the bankrupt would not benefit, as the property would devolve upon the surety and not upon the trustee in bankruptcy. On the other hand, if the guarantor offers to pay the balance outstanding, he is entitled to any securities of the debtor held by the banker in respect of the debt, while if the banker proves against the bankrupt's estate, he must deduct the value of any securities *of the debtor* held by the bank in respect of the advance.

**LUNACY OF GUARANTOR.**—On the receipt of express or implied notice of the *lunacy of a guarantor*, the banker should at once stop the relative account, and claim repayment from the principal debtor, or in default from those responsible for the control of the estate of the surety. In *Bradford Old Bank v. Sutcliffe*, 1918, it was held that the lunacy of a surety is to be regarded as terminating the contract of guarantee as to future advances. Hence any advance granted by the banker after receipt of the notice will not be recoverable from the lunatic's estate, in spite of the fact that the agreement may provide that

the guarantee is to continue until terminated by three months' notice from the surety.

### Determination of Joint or Joint and Several Guarantees.

In general, joint or joint and several guarantees are determined by circumstances similar to those which operate in the case of individual sureties, but several special points require to be noticed.

On receipt of notice, either orally or in writing, from one of several sureties that he wishes to terminate his liability, the banker should at once stop the relative account until alternative satisfactory arrangements are made by the surviving sureties, or by the adhesion of a new surety. In the absence of such new arrangements, he should demand repayment of the advance from the principal debtor, and in default thereof claim against all the sureties jointly for the amount due. Similarly, on receiving notice of the death of one of several sureties, the banker should immediately stop the debtor's account, and pass any future transactions through a new account, which should be maintained in credit unless there are special circumstances justifying an advance thereon. He should then arrange for a new surety to take the place of the deceased, or get the surviving guarantor or guarantors to accept responsibility for the outstanding balance, or, if he deems fit, demand repayment of the advance from the principal debtor, and in default, claim against the surviving guarantors and also against the estate of the deceased. Similar steps should be taken by a banker on the bankruptcy of one of a number of joint and several sureties.

Most bank guarantees now provide for the joint and several liability of co-sureties, in which case a continuing guarantee is not actually ended by the death of a surety, and his estate remains liable until notice is given by the personal representatives. But it may be observed that if the liability is *joint* only, the estate of a deceased or bankrupt guarantor is released from all liability on the death or bankruptcy of the surety concerned. The *lunacy* of a joint surety determines the liability of his estate in respect of any future advances under the guarantee, but the estate remains liable for the debt due at the date of the lunacy.

### Determination by Changed Constitution of a Firm or Company.

By section 18 of the Partnership Act, 1890, it is enacted :—

18. A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.

By virtue of this section, a guarantee given in respect of an overdraft on a partnership account is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the firm's constitution, such as may be occasioned by the death, bankruptcy, retirement or admission of a partner. In any of such circumstances the guarantee will be ineffective unless there is a *novation* of the original contract, i.e., an agreement between *all* the parties that the guarantee shall apply to the newly constituted firm which assumes liability for the outstanding debt. Even where the terms of a guarantee expressly provide for any such eventuality, it is desirable that the relative account should be at once stopped by the banker upon receipt of express or constructive notice of any of the events referred to, so that new arrangements may be made for his protection, and so that the estate of the deceased, bankrupt or retiring partner may be held liable in respect of the balance outstanding at the date the account is broken. In the absence of an express provision in the contract of suretyship covering such a contingency, the Rule in Clayton's case will operate against the banker unless the account is stopped and future transactions (if any) are carried to a new account.

Care has to be exercised, also, in the case of guarantees held by a joint stock bank which is absorbed in or amalgamates with another institution, although, as such events are now becoming much less frequent than has been the case in recent years, the points involved are not of great practical importance. The general principles may be stated briefly as follows. Guarantees held by a joint stock bank which is *absorbed* by another concern in such a way as entirely to lose its identity are determined on the happening of the event, so that the relative accounts should be stopped pending the making of new arrangements, and new agreements must be signed by the sureties if future advances are to be covered. Guarantees held by the *absorbing* bank are not, however, affected in such circumstances, the absorption by a larger bank of a smaller institution being regarded for this purpose much in the same light as the opening of a new branch or of new branches.

On the *amalgamation* of two or more joint stock banks, the guarantees held by any of the concerns involved in the amalgamation are determined as from the date of the amalgamation, in the absence of express agreement by the sureties to the contrary. Accordingly, unless provision is made to cover the eventuality, the relative accounts should be stopped, and the old guarantees should be replaced by new agreements in favour of the new institution. For similar reasons, guarantees given by or on behalf of joint-stock companies which are absorbed or amalgamated are, in the absence of express provisions, revoked as to future transactions by the absorption or amalgamation, so that in order to protect itself in such circumstances, the bank should

stop the relative account and obtain the signatures of the sureties to a new agreement.

In practice, bankers' guarantees now provide for all such eventualities as the kind here referred to, as will be clear from a perusal of the specimens given in the preceding pages, but, even where express provision is made, it is frequently to the bank's advantage to replace old agreements with new ones which apply more explicitly in the changed circumstances. If the change involved is in the constitution of the bank itself, the signature of each guarantor may be obtained to a form of novation, in which he agrees unconditionally to be bound to the bank as newly constituted. If such provisions are not inserted in the guarantees or specially provided for in new agreements, the guarantees taken by a bank may become ineffective, for while sureties are not liable for advances made by any one other than the party to whom they agreed to become responsible, it would clearly be inequitable if a bank could hold liable any person (natural or legal) other than the one by whom the guarantee was originally signed.

### **Rights and Obligations of the Guarantor.**

It has already been stated that a guarantor, on assuming liability, is entitled to reasonable information from the banker in reply to any enquiries which he may make concerning the position of the debtor. But provided a guarantor signs of his own free will and without coercion, he cannot evade liability unless he can show that there has been such misrepresentation or concealment on the banker's part as will amount to fraud.

When the guarantee is obtained, the surety is entitled at any time to learn the amount for which he is liable, but he has no right to inspect the accounts of the debtor or to obtain from the banker other information of a confidential nature. On the ascertainment of his liability, and provided there is no agreement to the contrary in the guarantee, the guarantor may at once terminate his contract by paying the amount due, subject to his being held liable for any uncompleted transactions; or he may at any time request the banker to demand repayment of the amount guaranteed from the principal debtor. If repayment is made by the guarantor, he may himself proceed to recover the amount from the principal debtor, and, if the claims of the bank against the debtor are entirely satisfied, he is entitled to any securities of the debtor held by the bank, whether he was aware of the existence of the securities or not, and whether such securities were deposited before or after the signing of the guarantee. He is also entitled to the absolute benefit of any security, such as a bond, indemnity or title deeds, deposited with him by the principal debtor on account of the guarantee, and does not hold any such security as a trustee for the creditor. But his right



to securities in the banker's hands applies only to those which are expressly held in respect of the advance paid off, while if the guarantee is given for part only of the amount due by the principal debtor, the surety can claim only a *pro rata* interest in the securities held by the banker as cover for the debt. In any case, the banker should advise the debtor or other interested parties before giving up to the surety any securities in his hands. Moreover, it is always desirable in the surety's own interests that he should, before actually paying the debt, advise the debtor of his intention to repay what is due, but following repayment, he may take action against the debtor in respect of the amount repaid.

In enforcing his remedies against the principal debtor, the guarantor may stand in the place of the banker whose debt has been repaid, and if necessary, he may sue in the banker's name on any securities or choses in action held by the banker in respect of the advance. Moreover, on the bankruptcy of the principal debtor, a guarantor, who has paid the amount for which he agreed to become liable, may prove against the debtor's estate in respect of the amount paid under the guarantee, unless, by the terms of the guarantee, he has expressly waived the right to do so in favour of the bank. Nowadays, most bank guarantees provide that the banker may claim against the debtor's estate for the full amount owing on the account, notwithstanding any payment made by the guarantor, and also that the guarantor shall not prove against a bankrupt estate in competition with the bank. Unless there were some agreement on this point difficulty might arise, as two independent claims in respect of the same liability would obviously not be admitted by the trustee.

### Discharge of a Surety.

**REPAYMENT.**—The surety is, of course, entirely discharged if the debt due to the banker is repaid or otherwise satisfied by the principal debtor, and in such circumstances as in any other circumstances where his liability is extinguished, it is usual for his signature to the guarantee to be cancelled and the documents transferred to him.

**ALTERATION OF SURETYSHIP.**—In the ordinary relationship of principal and surety, and in the absence of express agreement to the contrary, the surety is freed from liability by any alteration in the terms of the original contract between the creditor and the debtor without his consent, unless such alterations are of little importance, or such as will react to the benefit of the guarantor. In particular, he will be released to the extent that he is injured by any action of the creditor which diminishes or destroys the value of the security, as, for example, where the creditor accepts a substituted or different security, or loses the security, or permits the debtor to obtain possession thereof, or where he makes the

security ineffectual by omitting to give any necessary notices, or by failure to effect proper registration of the security in accordance with the law.

**GIVING TIME TO DEBTOR.**—The surety is also discharged by any binding arrangements made by the creditor to give time to the principal debtor, unless in making such new arrangements, the creditor expressly reserves his rights against the surety. But in order that the giving of time to the principal debtor may operate to discharge the surety, there must be evidence of a binding agreement between the banker and the principal debtor without the surety's consent, and such agreement must be supported by consideration.

The giving of time to a debtor discharges a surety because it deprives the latter of his right to call *at any time* upon the debtor to repay the amount due, or to require the creditor *at any time* to demand repayment. If the creditor has agreed to give the debtor time, the surety obviously cannot exercise either of the foregoing rights until the time has elapsed. Hence, *as prima facie* his position is altered to his detriment without his consent, he is freed from liability. And this is so even though his position is in no way prejudiced. "If his right is suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless by the principles of equity it is established that this (i.e., the giving of time) discharges the surety altogether" (*Polak v. Everett*, 1876). But a guarantor is not released if he has in any way impliedly authorised the debtor to apply to the creditor for time in which to pay; and if time is given in respect of one of two separate debts, the surety is not discharged from liability on the other.

Similarly, one of several joint sureties will be discharged if the banker arranges without his consent to release or give time to one of the others. The reason for this is that, by giving time to the principal debtor or to one of several joint sureties, the banker may prejudice the right of the surety or co-sureties to recover from the debtor in the event of their having to pay the advance.

In order to negative such restrictions, bank guarantees specifically provide that the surety is not to be discharged by any variation in the terms of the contract between the banker and the principal debtor, so that a guarantor who signs such an agreement cannot thereafter evade liability on the ground that he was not informed of the changed circumstances. But even if the banker appears to be adequately protected by the comprehensive character of his guarantee, it is always desirable to advise the surety of any contemplated change in the relationship between the banker and the customer.

The other circumstances in which a surety is entirely discharged from liability in respect of past and future debts are (a) where the creditor fails to take proceedings against the debtor

or the guarantor within the limit of time fixed by the Statutes of Limitation (see overleaf); or (b) where the surety can show that the guarantee was obtained by fraud or misrepresentation on the part of the creditor or of the debtor; or (c) by a change in the constitution of the bank or of the principal debtor or of the guarantor himself, which involves a novation of the original agreement if it is to remain, or (d) in the case of a joint guarantee, if judgment is obtained against one or some of the *other* guarantors, and is unsatisfied, or (e) by absolute release of the principal debtor or of one of a number of joint sureties.

**FRAUD OR MISREPRESENTATION.**—In order to evade liability on the ground that the guarantee was obtained by fraud or misrepresentation, the surety must not only prove that there was misrepresentation, but also that he was induced to sign the agreement only by reason of the misrepresentation.

**NOVATION** means that a contract in existence is replaced by a new contract, either between the same parties, or between different parties, the old contract being discharged, and the rights and liabilities thereunder being assumed by the new parties. There is novation when a bank agrees to accept the liability of a new partnership for that of the old firm whose constitution has been changed, in which case a surety for the firm's account will be released unless he is a party to the agreement. Similarly, novation occurs where one bank absorbs another and takes over the debtor customers of the absorbed bank. In such circumstances, sureties for liabilities of the debtors to the absorbed bank are discharged as to *future* advances unless they agree to become liable to the absorbing bank.

A co-surety who pays the amount of the debt owing by the principal debtor, or who pays more than his proper share of the liability under the terms of the guarantee, is entitled to proceed against his co-sureties so that the debt may be equitably distributed, or distributed in accordance with the terms of the guarantee if the amounts guaranteed by the several sureties are unequal. Any of such sureties paying the debt is in the same position as a sole surety in respect of his rights to claim from the banker any securities of the debtor held by him in respect of the advance.

**RELEASE OF THE PRINCIPAL DEBTOR.**—The point is not of great importance in banking practice, but it must be observed that, in general, an absolute release of the principal debtor from his obligation entirely frees the surety from liability to the creditor. But the surety is not released if the creditor enters into a *covenant not to sue* the principal debtor, so long as the terms of the covenant are not such as to constitute an absolute release.

Similarly, the release of one of several *joint* sureties discharges the others, but if the sureties have contracted *severally*, or *jointly and severally*, the release of one does not discharge the remainder.

### Guarantees and the Statutes of Limitation.

As in the case of other contracts, action on a guarantee under hand is barred after the lapse of six years from the time when the right to take action first arose, while in the case of a guarantee under seal, the right is barred after twenty years from the date on which action could have been taken. In the much quoted case, *Parrs Bank v. Yates*, 1898, it was held that the Limitation Act operated to prevent the banker from recovering even under a continuing guarantee, terminable on six months' notice in writing by the guarantor, in respect of advances made by the bank up to a period more than six years before the action was commenced. It was held in this case that the right of action against the guarantor arose in respect of each item as it was entered into the account, so that the Statute of Limitation operated to prevent the banker from recovering advances, or any interest thereon, in respect of which the customer became indebted more than six years *before* the date of the action, although the bank could recover from the guarantor interest which had accrued *within* six years of the action.

This decision has been the subject of much criticism in banking circles, where it is contended that it is quite inconsistent with the intention and effect of a continuing guarantee, and quite unreasonable and impracticable, to assume that a banker has a right of action against the guarantor in respect of each debit item as soon as it is placed to the account. Nevertheless, the decision must be respected, and consequently all bankers' guarantees are now framed to include a provision that the surety undertakes to repay the amount due *two or three days after demand by the banker*. By the insertion of this stipulation, the banker's right of action against the guarantor does not arise until two or three days after a demand for repayment has been made by the banker and refused by the surety. The demand for repayment is thus made a *condition precedent* to the right of action by the banker against the guarantor. The Statute will, of course, begin to run in favour of the surety and against the banker from the expiration of the time here mentioned, but, whatever the circumstances, bankers in practice take steps before the expiration of the six years to obtain from the surety an acknowledgment in writing of the existence of the guarantee, or to obtain his signature to a new guarantee. If a letter of acknowledgment is obtained, it should be stamped as an agreement with a 6d. impressed or adhesive stamp. If the guarantee is under seal, an acknowledgment to keep the agreement alive after the expiration of the prescribed period of twenty years must itself be under seal.

It may be added that whilst a part payment of the debt, or an acknowledgment in writing by the principal debtor, will have the effect of preventing the operation of the Statute of Limitation

in his favour, it will not prevent the Statute from running in favour of the surety if he has refused to comply with a demand for payment under the terms of his guarantee.

### PROMISSORY NOTES AND BILLS AS SECURITY

In the chapters on bills of exchange and promissory notes it is explained that such instruments are frequently signed by one or more parties thereto in order to accommodate a person who may or may not himself be liable as a party. Thus, a person may add his name to that of another person as co-maker of a joint and several promissory note, in order to enable the other to obtain an advance against the instrument. In such circumstances anyone taking the instrument without notice of the relationship of the parties, may hold them jointly and severally liable for due payment, but if the holder receives actual or constructive notice that the true relationship of the makers is that of principal and surety, he must treat the parties accordingly and exercise care to ensure that the surety is treated as such and not as a principal debtor.

In practice, bankers frequently make advances against the security of promissory notes or bills of exchange which are signed by one or more persons in order to accommodate the party to whom the advance is made. The usual procedure is to discount the promissory note or bill of exchange, and either to pay over the proceeds in cash or to credit them to the account of the accommodated customer. In such circumstances the banker should treat the persons signing as sureties in exactly the same way as he would treat them if they had signed a formal contract of guarantee. Thus he should not enter into any binding agreement with the principal debtor with the object of giving him time in which to pay the instrument, nor should he vary the original arrangements regarding the deposit of security (if any) without the express consent of the surety. The necessity for care is all the more urgent because the banker cannot protect himself, as in the case of a formal guarantee, by obtaining the signature of the surety or sureties to clauses which provide for the retention of their liability in the event of variation of the original agreement.

A banker who proposes to rely on a bill of exchange or promissory note as security, should ensure that the signature of the party or parties who sign as sureties are witnessed and initialled by a responsible official of the bank. It is desirable also that, when such an instrument is taken as security for an overdraft on current account, it should be accompanied by a memorandum signed by the customer explaining the nature of the deposit, while the instrument itself should either be indorsed in blank or made payable to the banker's order. If the customer obtaining the advance does not sign as an original party, he should

be required to indorse the instrument as evidence of his liability thereon.

If a promissory note or bill of exchange taken as security is *not* payable on demand, the memorandum of deposit should expressly provide that the instrument is to be regarded as a *continuing* security, otherwise the Rule in Clayton's case will operate against the banker. On the other hand a promissory note payable on demand can be regarded as a continuing security even if no memorandum is taken.

Particulars of all bills of exchange or promissory notes taken as security are entered in the Register of Promissory Notes or in the Bills Discounted Ledger, whence their total is carried to the Promissory Notes Account or the Bills Discounted Account in the General Ledger. If the bills are payable after date, brief particulars of each are entered in the Bill Diary, which is periodically inspected by a senior official so that steps may be taken at maturity to obtain renewal or repayment as the case may be. Within a few days of the date of maturity of an instrument which is thus taken as security, the banker should advise the principal debtor of the fact and request him either to make arrangements for a renewal or to provide for payment of the instrument. If such an arrangement or payment is not made by the due date, application should be made to the surety or sureties, and in the event of the instrument being dishonoured by the party or parties primarily liable, notice should at once be given to any other parties to the instrument. The banker may thereafter exercise his remedies against any or all of the parties by taking action against them for payment. If payment is received, the banker should surrender the instrument to the party paying, but if a renewal is given the old note should be cancelled, and, if necessary, handed to the signatory or signatories.

As the remedy on a bill of exchange or promissory note is lost as in the case of any other simple contract debt if action is not taken within six years from the time when the right of action first arose, a banker who holds such an instrument as security should obtain a written acknowledgment of the debt from all the parties thereto before the expiration of the statutory period, or he should obtain their signatures to a new instrument. In the case of a bill of exchange or promissory note payable on demand, the time begins to run from the date of the instrument; in other cases the time commences from the date of maturity.

### ASSIGNMENTS OF DEBTS AS SECURITY

It has been pointed out that by the Law of Property Act, 1925, a creditor may make an *absolute* assignment of a debt or other legal chose in action to another person, provided that the assignment is made in writing, and that written notice thereof is sent to the debtor or to the trustee holding the funds assigned.

If the assignment is properly made, the assignee is given power to sue for the amount in his own name, and may give the debtor a good discharge for the debt.

Advantage of these provisions is sometimes taken by a customer in order to provide a banker with security in respect of an advance, in which case an assignment, under hand or by deed, is executed by the customer in favour of the banker, who may thereafter at any time claim payment from the third party or trustee. Such an assignment usually embodies a written order addressed by the customer to his debtor, instructing the latter to pay the amount due to the banker, who is authorised to give an effective discharge for the payment. The document contains a Form of Acknowledgment which the debtor is required to sign and return to the bank.

The debtor or the trustee holding the funds cannot, after receipt of the notice, pay the amount due to anyone other than the banker, but as the priority of several assignments of the same debt is determined by the dates on which notice is given to the debtor or to the trustee, it is desirable that notice be given as soon as the assignment is executed. If this is not done, the debtor may pay over the amount due to the creditor, or the latter may execute a subsequent assignment which will take precedence over that given to the banker, if the *second assignee* is the first to give notice to the debtor. Moreover, a banker who proposes to accept such a security should safeguard himself by requesting the debtor or the trustee to inform him whether any previous assignments exist; at the same time, he should request a confirmation of the amount or value of the debt, and information as to whether the debtor has any counter claim against the creditor.

It may be observed that a general assignment of existing or future book debts, or of any class of such book debts, made by a person who is engaged in any trade or business, is *void* against that person's trustee in bankruptcy unless the assignment is registered as an absolute bill of sale. The following assignments are not, however, void under this rule: assignments of (a) book debts due from specified debtors at the date of the assignment; (b) book debts accruing due under specified contracts; (c) book debts included in a transfer of a business made *bona fide* and for value, and (d) book debts included in any assignment of assets for the benefit of creditors generally.

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**Note: Determination of Guarantee by Notice.**—The view quoted on p. 618, *et seq.*, is that of Sir John Paget. Mr Bernard Campion, K.C., maintains, however, that a guarantee which clearly provides for a specified period of notice is not determined until the expiration of that period, so that the bank may continue to rely upon it for all ordinary dealings with the customer, and can hold the guarantor liable, within the amount of the guarantee, for any further advances granted during the currency of notice. If this view is accepted, and the banker chooses to rely on the express terms of his contract, the customer's account need not be stopped until the expiration of the notice. While this may be the strict legal position, Sir John Paget's view appears to be the safer (and more equitable) practical guide.

## CHAPTER 24

### LAND AND GOODS AS SECURITY

TITLE deeds to land and buildings and documents of title to goods are frequently taken by bankers as security for advances, the former chiefly in country towns and agricultural districts, and the latter principally in and around seaports, in which case the nature of the goods depends largely on the class of trade passing through the port concerned. It must be remembered that in both cases the banker's security consists in the actual land, buildings or goods to which the documents relate, and not in the documents or deeds themselves. The documents and deeds are merely a "symbol" of the land or goods to which they relate, so that, apart from the necessity of ensuring the validity, completeness and correctness of the documents, special precautions are necessary to ensure the proper valuation and protection of the property concerned.

### LAND AS SECURITY

In law, the term "*land*" relates not only to the actual surface of the soil, but also to everything above and below the surface, including minerals, buildings, fixtures, water, growing crops and timber. It is in this sense that the term "*land*" is used in the following paragraphs, but, for the sake of clearness, the terms "*buildings*" or "*house property*" will be applied where such meanings are specifically intended.

Although land and buildings may form a valuable and useful form of security for overdrafts on current accounts, or for fixed advances on loan accounts, neither is an ideal type of banking security. As a rule they are offered as security rather for long period loans than for the short period advances which afford the banker the greatest degree of security and liquidity of his funds, and at the same time return him the greatest margin of profit. "Land is not a banking security, and real property should, as a general rule, be lent against only to good borrowers and for limited periods; say, to bridge over a short period when the source of repayment is known and the means of repayment is in sight; for example, pending the completion of a mortgage which the banker is satisfied is in course of arrangement".<sup>1</sup> Moreover, the manner in which the property in land and buildings is conveyed and taken as security is governed by one

<sup>1</sup> F. E. Steele, *The Banker as a Lender*, page 83.



of the most complicated and extensive branches of the law, so that apart from the special precautions involved in connection with such matters, the services of a solicitor are almost invariably required, resulting usually in considerable expense and delay in completing the necessary arrangements.

Fortunately, the law relating to property in land has been much simplified by the *Law of Property Act, 1925*, and the *Land Registration Act, 1925*, the procedure having been thoroughly re-organised, while a number of antiquated and complicated details have been finally abolished.

In spite of the objections and disadvantages, however, advances against the security of agricultural land and houses or shop property are extremely common, so that a reasonable knowledge of the methods by which such security may be effected and held is essential to every practical banker. On the other hand, few banks would in practice now accept such security without first of all taking full and independent legal advice, so that it is unnecessary for the purpose of this book to do more than outline the particular principles which must be considered, and the general procedure which is involved, in taking such security from a customer.

### Legal and Equitable Rights or Interests.

Rights to or interests in land may be either *legal* or *equitable*. The most important difference between these rights is that a person who takes a *legal* interest is bound by any prior legal interests in the land, whether he had notice of them or not, whereas his title is unaffected by prior equitable interests provided he had no notice of such interests when he assumed the legal right. On the other hand, the title of a person who acquires only an *equitable* interest is subject to any prior legal or equitable rights in or over the land, whether he had notice of them or not.

The object of the new Law of Property is to simplify and facilitate sales of land by reducing to a minimum the number of possible legal interests, and by converting all other interests into equitable interests. The legal owner of property may now transfer it to another in such a way that the purchaser is unaffected by most equitable interests even if he has notice of them.

### Classes of Landed Property.

Under the new law, only two classes of legal estates are recognised: (a) *Freeholds*, or estates in fee simple, in which case the possessor has virtually absolute ownership of the land and may deal with it as he likes, subject to the general law of the country and to any restrictive covenants to which he may have agreed on taking possession of the land; and (b) *Leaseholds*,

where the estate in land is granted by the owner (termed the *lessor*) to another person (termed the *lessee*) for a fixed term of years, at the expiration of which the property reverts to the original owner. In addition to this, certain interests or charges on land, the chief of which are *legal mortgages*, are recognised as legal interests.

Freehold property is sometimes described as *real* property, *real estate*, or *realty*, and may be regarded generally as applying to immovable property in contradistinction to *personal* property, *personal estate* or *personalty*, which includes all movable chattels and choses in action, such as money, goods, furniture, debts owing or accruing due, stocks and shares. Leasehold property, however, is regarded as belonging to the latter class in spite of its immovable nature.

The distinction was formerly of importance as upon the death of a person intestate his *personalty* passed to his next-of-kin while his *realty* devolved upon his heir-at-law, but in the case of intestates dying after 31st December, 1925, no such distinction is made, so that the antique difference between realty and personalty has lost much of its former importance. The distinction must still be made, however, for death duty purposes.

**COPYHOLD TENURE.**—The complicated form of land tenure known as *copyhold*, a relic of the ancient feudal system, was abolished by the Law of Property Act, 1922, as from the 1st January, 1926, when all land so held automatically became freehold. Copyhold tenure implied that the title of the person in possession of the land, i.e., the *copyholder*, was evidenced by his holding a copy of an entry or enrolment on the Manorial Court *Roll*—once an actual roll of parchment, but now a more prosaic book or ledger—the entry setting forth the service and payment due by the tenant to the lord of the manor. Transfer of the land by a copyholder was effected by surrendering the land to the lord for the use of the purchaser or incoming tenant, who on admittance to the Roll was usually required to pay a "*fine*" to the lord of the manor, in return for which the steward of the manor issued to him a copy of the entry of his title on the Court Roll.

Although such tenure is abolished by the new Act, provision is made for the payment of compensation to the lord of the manor, and also to the steward of the manor for the loss of his office, which forms a charge upon the land with priority over all subsequent charges. The rights of the lord of the manor remain in force for a period of ten years from the 1st January, 1926, unless they are extinguished in the meantime, so that bankers taking such property as security during the next few years must exercise precaution to ensure that, if arrangements have not already been made for the payment of compensation, due allowance is made for such payment in estimating the value of the security.

## How the Title to Land is Evidenced.

The documents evidencing the title to land or buildings are referred to collectively as the *title deeds*, or deeds of title. A *deed*, according to Blackstone, is "the most solemn and authentic act that a man can possibly perform with relation to the disposal of his property, and whereby a man shall always be estopped from, or not permitted to, aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed."

The banking reader will at once recognise these terms as applying to the bundles of parchment tied up with green or red tape which are usually to be found carefully stored away in the bank strong-room, being characterised as much by the seeming importance of their appearance as by their mustiness and scarcely intelligible phraseology.

As a rule, the deeds will consist primarily of a series of *conveyances*, whereby the property has been from time to time transferred from one person to another. They may include documents evidencing the mortgage of the property at various times, together with a *reconveyance* or reconveyances, whereby the title to the property is reinvested in the mortgagor by the mortgagee on repayment of the money advanced. If the property has at any time been leased for a term of years, a deed or deeds evidencing the lease will be included, and should be accompanied by the instrument or instruments (if any) whereby the property was reconveyed to the lessor. In order that the person in possession of the deeds should have a clear title to the land concerned, the estate should be properly vested in him by the last instrument in order of date, while, as every deed forms a link in the chain of title, no deed should be missing which is required to complete the chain.

Apart from the actual deeds, certain other documents may be included, as, for example, settlements, deeds of gift, a receipt for the purchase money paid by the present owner of the land, and a solicitor's report as to the validity of the title conferred by the deeds, accompanied by an "Abstract of Title", setting forth the successive links in the chain of ownership. In the case of buildings there should also be a fire insurance policy covering their estimated value. Unless a recent report by a reputable firm of solicitors accompanies deeds deposited as security, a banker should obtain such a report from his own solicitor before committing himself to accept the deeds as correct and in order. It is usually wise to take this precaution even where such a report is already available with the deeds.

## Who may Hold Land.

The title to land may be vested in any person, natural or legal, or in any body, group, or association of persons, with the exception set forth in the Law of Property Act, 1925, that an infant

cannot hold any *legal estate* in land. Under the old law, land could be held by two or more individuals in the capacity of: (a) *joint tenants* or *joint owners*, in which case the land passed to the survivor or survivors on the death of one; or (b) as *tenants in common*, or *owners in common*, in which case the share of a deceased co-owner vested in his heir-at-law or was transferred according to the terms of his will.

As from the 1st January, 1926, tenancy in common is abolished, and all land now held by two or more persons must be vested in them only as joint tenants holding the land in trust either on their own behalf or on behalf of themselves and other beneficiaries. The number of such trustees is in all cases limited to four, and, if they hold on behalf of beneficiaries, the amount must be vested in them *for purposes of sale*, although the right to sell need not be exercised until it is necessary or desired by the beneficiaries under the trust. The powers of joint tenants who hold in trust on their own behalf are as defined in the Trust Deed and in the *Trustee Act, 1925*, and the *Administration of Estates Act, 1925*.

On the death of a person holding land or any other property, his interests, rights and obligations are vested in his personal representatives, *i.e.*, his executors if there is a will, or his administrators appointed by the Court if no will exists or no will can be found. In no case will probate or administration be granted to more than four persons jointly, but when a grant is issued to more than one person, *all* such persons must join in any necessary conveyances of real property, unless the sale takes place under Order of the Court, in which case the Court will decide how the conveyance shall be executed.

Real property which is bequeathed to a person need not be expressly conveyed to that person by the personal representatives of the deceased, but anyone thereafter dealing with the property for value should insist upon perusing the probate or grant of administration, and should also inspect the written consent of the personal representatives of the deceased to the passing of the property, for these together form a link in the chain of title deeds.

### The Registration of Titles to Land.

Dealings with deeds of title to land are much simplified and facilitated if the owner of property takes steps to have his title registered at the office of the Land Registry. By so doing the owner obtains from the State, after careful examination of his claim, a *Land Certificate* guaranteeing his title. This certificate thereafter takes the place of the title-deeds, and makes unnecessary the cumbrous and expensive process of investigating the chain of title in a frequently long series of documents, each time the land is transferred or otherwise dealt with.

The system of registration was first introduced by the *Land*

*Transfer Act, 1875*, which applied to freehold property and certain leaseholds, and made registration purely a voluntary matter. The arrangements were extended by the *Land Transfer Act, 1897*, which made registration compulsory in the City and County of London, and provided that any County Council could apply for an Order in Council making registration compulsory within its own area. The area of compulsory registration was not extended by the Land Registration Act, 1925, but the Act nevertheless provided that in ten years' time the area of compulsory registration should be extended under certain conditions without any request by the County Council.

To obtain registration under the Acts, the owner or person in possession of land has his title thereto thoroughly examined for a moderate fee by officials of the Registry, and thereafter details of the title and of all mortgages or incumbrances affecting the property are entered in the Register, and a Land Certificate is granted in favour of the applicant, describing him as the proprietor of the land and embodying particulars of the entry in the Land Register. Future transfers of the land or charges thereon are effected very easily by the deposit at the Registry of a simple form of charge or transfer, together with the relative land certificate, and the prescribed fee. In the case of transfer, the new owner does not obtain a complete title until the transfer is registered, but when this is done his name is entered on the register, and a fresh certificate is issued in his favour. In the case of a charge, particulars thereof are entered in the Register and indorsed on the land certificate. As a rule, both the certificate and the deed of charge are retained at the Registry, but a certificate of charge is in all cases issued in favour of the holder of the charge.

Possession of the land certificate is in itself *prima facie* evidence of the legal title of the holder to the land concerned, so that the proprietor may at any time obtain temporary loans by the mere deposit of the certificate with the lender. On his part, the lender is protected by the fact that details of any prior charges are indorsed on the certificate, while he is saved the trouble and expense of verifying the title. All that is necessary is that he should satisfy himself that the person holding the certificate is, in fact, the person in whose favour it is issued, although he may further safeguard himself by inspecting the Register with the owner's consent, and by giving notice of the advance to the Registrar. Once the certificate is issued, any transfer or charge over the property concerned cannot be registered without deposit and indorsement of the certificate, while the fact that the deeds themselves are indorsed with the name of the Registry, prevents their being wrongfully dealt with without the certificate either by the owner himself or by any third party.

Registration clearly provides a simple, clear, secure, inexpensive and expeditious method of dealing with land. There is

an absence of that delay and uncertainty which so frequently accompany transactions with ordinary title deeds, while the method of transfer, being very similar to that applicable to stocks and shares, is one which is readily understood by the man in the street. In view of these considerations, it is surprising that registration has not been more widely resorted to, and that legislation has become necessary with the object of ultimately making it compulsory.

The title vested in the owner of land by virtue of registration may be one of three kinds: (a) *absolute* title; (b) *good leasehold* title; or (c) *possessory* title. In the first case, the title of the proprietor is carefully examined, and if it is found satisfactory, he is given an absolute and indefeasible State guaranteed title to the property. Possession of a certificate of absolute title thus permits dealings with the land without trouble, expense or delay, while persons who wish to take a transfer of or charge over the land for value have merely to identify the holder of the certificate in order to be safely protected against fraud. A certificate of good leasehold title is an absolute guarantee of the title of the proprietor to the lease, but although it is safe enough for most practical purposes, it does not guarantee the title of the freeholder who originally granted the lease.

A certificate of possessory title may be obtained by the proprietor on producing to the Registry *prima facie* evidence of his title to the land, as, for example, by deposit of the last deed by which the property was transferred to him. As the proprietor's title is not thoroughly investigated, he is not at once given a certificate of absolute title to the land, but, after the expiration of fifteen years from the date of the original registration in the case of freehold, or ten years in the case of leasehold, a certificate of absolute title or of good leasehold title will be issued on application by the proprietor, subject to his proving that he was a *bona fide* purchaser of the land, and that he made a proper examination of the title under competent legal advice on assuming the ownership. Registration with possessory title is thus accompanied by much the same advantages as registration with absolute title, but while the title is kept clear between the date of the original registration and the date of registration with absolute or good leasehold title, it is possible that the proprietor's title may be affected by claims made during the transition period.

Transfers of and charges over land situated in the counties of Yorkshire and Middlesex are controlled by special statutes, the general effect of which is to provide that deeds transferring or charging property in those counties will not be valid unless they are registered in accordance with the relative Act at the local registries, the object being to minimise loss on the part of the owners of property through fraudulent dealings with the deeds, or through loss or destruction of such documents. Registration under these Acts does not in itself provide evidence of

*title*, as in the case of registration under the Land Transfer and Land Registration Acts, while registration under the latter Acts makes unnecessary the registration of deeds with the Yorkshire and Middlesex Registries.

### Charging Land as Security.

Land, whether freehold or leasehold, may be charged as security for advances in two ways, by : (a) *legal mortgage*, or (b) *equitable mortgage*. Considerable modifications in the existing law relative to the taking of charges over land have been effected by the Law of Property Act, 1925, and as from 1st January, 1926, when the Act came into force, all existing mortgages of freeholds and leaseholds automatically came under the new law.

### Legal Mortgages of Freehold Property.

Under the old law a legal mortgage of freehold property consisted in the conveyance of the property from the mortgagor to the mortgagee subject to the former's *equity of redemption*, i.e., the land was conveyed absolutely to the mortgagee with a proviso that he should reconvey the land to the mortgagor on payment of the money borrowed (the mortgage money), on the date specified, usually six months after the original date of the mortgage. Prior to 1st January, 1926, therefore, the effect of a legal mortgage was to make the mortgagee the owner of the freehold, subject to the mortgagor's right to regain the ownership of the land on paying the amount borrowed. If such amount was not paid on the day named in the deed, the mortgagee at common law became the absolute owner of the property, free from the mortgagor's right to repay, although a Court of Equity would usually enable the mortgagor to exercise his right of redemption even after the date of repayment had passed.

The new law, however, aims at leaving the legal ownership of the property vested in the mortgagor, while, at the same time, giving the mortgagee a legal interest. Consequently, the new Act provides that after 1st January, 1926, a legal mortgage of freehold can be created either by : (a) the mortgagor granting the mortgagee a lease for a term of years, subject to the lessor's right of *cesser on redemption*, i.e., his right to have the lease extinguished on repayment of the money borrowed, and subject also to his right to regard the lease as forfeited on the failure of the lessee to fulfil any covenants contained therein ; or (b) by a charge by deed expressed to be by way of legal mortgage. If the first method is adopted, there is no limit to the term of the lease which may be granted, but the effect of the second method is to give the mortgagee the same protection as if a lease for 3000 years had been effected in his favour.

Any number of legal mortgages may be created in the same

way, and each mortgagee will obtain a legal estate in the land concerned, but the term granted to the second mortgagee will be one day longer than that granted to the first mortgagee, while the period of the third mortgage will be one day longer than that of the second, and so on. As all mortgages existent when the new Act came into force on the 1st January, 1926, automatically came under the new law, the legal estate in any land so charged became vested in the mortgagor, while the first or only mortgagee obtained a legal estate in the land for a term of 3000 years. Second or subsequent mortgagees obtained a term longer by one day than that of the immediately preceding mortgagee. A legal mortgage which is *not* accompanied by the deposit of the title deeds relative to the property concerned is a "*puisne mortgage*", and should be registered as a land charge in the Register of Land Charges at the Land Registry Office, London; otherwise, by the Land Charges Act, 1925, any legal or equitable mortgages subsequently created may take priority. And in any case, as is shown below, an equitable mortgage obtained by mere deposit of the title deeds will take priority over a subsequent legal mortgage created without the deeds, thus indicating that the new law has made it far more important than formerly that a legal mortgagee should insist upon the deposit with him of the relative deeds of title.

A legal mortgage of registered land may be effected by the completion of a simple instrument of charge supplied by the Land Registry, followed by the deposit of the charge with the relative land certificate in the hands of the Registrar, by whom the documents are usually retained until the mortgage is cancelled. Particulars of the charge are entered on the Register, a note thereof is entered on the land certificate, and a Certificate of Charge is issued by the Registrar. Registered land may also be mortgaged by deed in the ordinary way, but such a mortgage cannot be registered in the same way as a mortgage which follows the procedure prescribed by the Land Registration Act, although the charge may be protected by a *caution*, i.e., a notice on a prescribed form which is forwarded to the Registrar, who, after receipt of the caution, will give the person holding the charge notice of any proposed dealings with the land, and thus enable the mortgagee to take steps to protect his interests.

A banker who proposes to take a legal mortgage of registered land should carefully examine the relative certificate in order to ascertain whether it is indorsed with any outstanding charges, and he should also search the Register to determine whether any other charges are outstanding which are not indorsed on the certificate. If the latter conveys only a possessory title, the owner should be required to deposit all title deeds relative to the land prior to registration.

All legal or equitable mortgages of registered land owned by a joint-stock company must be registered at the Land Registry,



as well as with the Registrar of Joint-Stock Companies in accordance with Section 93 of the Companies (Consolidation) Act, 1908.

### Legal Mortgages of Leasehold Property.

Under the old law, a lessee, i.e., a person in whose favour a lease of property had been granted, could assign his right in the property by mortgage for the full term of the lease. The new law provides, however, that a mortgage of leasehold property must be made either : (a) by a *sub-lease* for a term less by one or more days than the full period of the lease, or (b) by a *charge by deed* expressed to be by way of legal mortgage, which has the same effect as a sub-lease for a term one day less than the full period of the lease. Second and subsequent mortgages of leasehold property can be made for periods one day longer in each case than the term of the mortgage immediately preceding, provided that the term so given is at least one day less than that held by the mortgagor.

All mortgages of leaseholds existent on 1st January, 1926, when the new Act came into force, automatically came under the new law. Existing mortgages of leaseholds made by assignment of the full term of the lease automatically became sub-leases for a period less by *ten* days than the full term of the lease, while second or subsequent existing mortgagees of leaseholds obtain in each case a term longer by one day than that of the immediately preceding mortgagee. Existing mortgages made by way of sub-lease for less than the full term are unaffected by the Act.

### Equitable Mortgages of Freehold and Leasehold Property.

Prior to the 1st January, 1926, an *equitable* mortgage over land could be created by mere deposit of the relative title deeds, or by an instrument giving a charge over the property without actually conveying it, or by a second mortgage. Such mortgages did not convey a legal estate to the mortgagee and were unenforceable at Common Law, but were given full effect in Equity.

Under the new law a second or subsequent mortgage is now a *legal* mortgage as a legal estate is conveyed to the mortgagee, but informal mortgages by deposit of title deeds or the creation of a charge are still equitable mortgages, and in general the law governing such mortgages has not been greatly changed by the Act of 1925. The position under the old law is that, as between several equitable mortgages, the maxim will apply that *prima facie* "an equity prior in time is better in law", i.e., the rights of an equitable mortgagee are in general postponed to those of a prior equitable incumbrancer. A prior equitable title will be defeated by *subsequent* equitable rights only if the prior incum-

brancer has so acted as to prejudice the subsequent equitable mortgagee, as, for example, where a person holding a prior equitable charge gives up the deeds to some person other than his own agent, or fails to obtain possession of them. In regard to legal mortgages, the position of an equitable mortgagee is that his rights are postponed to a prior legal mortgage, and also to a subsequent legal charge, unless, in the latter case, the subsequent legal mortgagee took his charge with notice of the prior equitable interest, or was guilty of fraud or of "such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority" (*Oliver v. Hinton*, 1899).

As to what is notice sufficient to deprive a legal mortgagee of his priority over a prior equitable interest is a question of fact. But such notice may be either actual or *constructive*, and, as is usual in such cases, the question of constructive notice has in the past been the subject of a number of decisions in the Courts. Thus, in *re Castell & Brown, Ltd.*, 1898, a bank which accepted title deeds from a company as security for an overdraft was not deprived of its priority because, if it had made inquiries, it could have ascertained that the company had issued debentures charging all its present and future property, and containing a clause that the company could not grant any subsequent charge to take priority over the debentures. In other cases in which the circumstances were similar to the foregoing, banks have been held *not* to have constructive notice of a restrictive clause in debentures against the creation of subsequent charges even though such debentures have actually been held by the bank as security for advances to other customers, or even if, in accepting the security from the company, the bank is given express notice of the existence of prior debentures, but *no* notice of the existence therein of a clause prohibiting the creation of subsequent charges in priority to the debentures.

Nevertheless, restrictive clauses of the kind here referred to are now becoming so common that bankers who have knowledge of the existence of debentures may find it difficult to deny constructive notice of the restriction. In any event, it is unquestionably desirable, whenever a banker is asked to accept title deeds of a company as security, that he should in his own interests take steps to ascertain whether any prior charges exist and whether any such charges affect the value of his security.

An attempt has been made to clarify the position regarding constructive notice by Section 199 of the Law of Property Act, 1925, which gives a statutory definition thereof, but, without quoting the definition, it may be stated that the Act still leaves it open for decision as to what inquiries ought to have been made in any particular circumstances.

The new law does not affect equitable mortgages which are created by the deposit of the relative title deeds, but in other cases it provides that the charge over the property *may* be regis-

tered in the *Register of Land Charges* as a "general equitable charge". Although the Act does not *insist* upon the registration, either of general equitable charges or of a legal mortgage which is not protected by the deposit of the relative title deeds, registration should always be effected in such cases as the priority of all mortgages, whether legal or equitable, not protected by deposit of the relative title deeds, is determined by the order of registration. A mortgage, whether legal or equitable, protected by the deposit of the relative deeds, will have priority even though it is not registered, so that it is of first importance that anyone taking such a security over land should insist that the relative deeds be deposited in his keeping. Thus, the mere deposit of title deeds without a memorandum and without registration is a good security, whereas under the new law a legal mortgage, unaccompanied by the deeds, will be postponed to any legal or equitable mortgage previously registered and to an *unregistered* equitable mortgage which is accompanied by the deeds.

The foregoing remarks do not apply to land which is registered with absolute, possessory or good leasehold title under the Land Registration Acts. In such cases, an equitable mortgage may be created by the deposit of the relative land certificate (or a certificate of charge, if such exists—see page 640) with or without a memorandum, but the law as it now stands makes no provision for the registration of such equitable titles. On the other hand, the new Act provides that, in any cases where the equitable mortgagee deposits with the Registrar a *caution* on the prescribed form, the Registrar must thereafter give notice of any proposed dealings with the land, and so enable the equitable mortgagee to take any necessary steps to protect his interest. As, however, registration of subsequent charges cannot be effected without the production of the land certificate, it follows that any person taking registered land as security will be adequately protected by insisting upon the production and possession of the relative certificate.

• Charges over landed property (other than registered land) given by a limited liability company as security need not be registered as land charges under the new law if they are duly registered in accordance with Section 93 of the Companies (Consolidation) Act, 1908 (see Chapter 9). Again, *puisne* mortgages registered in the Middlesex or Yorkshire County Registries need not be registered as land charges, but any other charges, capable of registration under the new Act, need not be registered in the County Registries, if they are duly registered at the office of Land Registry.

### The Rights of a Mortgagee.

If the money secured by a mortgage, whether legal or equitable, is not repaid on the due date, or is not repaid after due notice

calling in the advance has been given, or if the mortgagor makes default in payment of interest, the mortgagee has one of several remedies open to him. In the first place, he may *take action against the mortgagor personally* in respect of the covenant to repay the amount borrowed. In the case of a legal or equitable mortgage, this right exists for twelve years from the date on which the loan secured becomes repayable.

Secondly, if he holds a legal mortgage, *he may exercise a power of sale* of the land, and can, if necessary, convey the property to a purchaser. This power only arises, however, when the mortgage money is due, and it cannot be exercised unless (1) some of the interest is two months in arrears; or (2) the mortgagor has failed to repay the whole or part of the amount due after three months' notice, or (3) the mortgagor has failed to comply with some other provision contained in the mortgage deed or in the Law of Property Act, 1925, or any prior enactment which applies. An equitable mortgagee has no power of sale, but may apply to the Court for an order for sale, which in effect supplies him with a similar remedy. A right of sale which it is sought to exercise in respect of legal mortgages created after 31st December 1925, because the mortgagor has become bankrupt or has committed an act of bankruptcy, cannot be exercised without application to the Court. Furthermore, wherever a power of sale is exercised, the proceeds will in all cases be subject to any prior charges, and, if necessary, must be held in trust for the persons holding such charges, by the mortgagee who exercises the power of sale. All mortgages taken as security by bankers expressly confer this power of sale, and provide that it may be exercised if repayment of the money borrowed is not made *upon demand*, i.e., the time is much shorter than that provided by the Act.

A banker, or other person who exercises his power of sale as a mortgagee, may sell the land either publicly or privately as he deems fit, but he must reasonably safeguard the interests of the mortgagor, and obtain a reasonably fair price for the property. Any balance remaining after payment of what is due to the mortgagee must be held in trust, either for the mortgagor or for persons holding any subsequent charge over the property, but a mortgagee who has no notice of any other charge over the property may safely pay the residue to the mortgagor.

Thirdly, the mortgagee, whether legal or equitable, *may apply to the Court for an order to foreclose*, whereby the mortgagor is deprived of his right or title to the property, and the mortgagee is constituted the absolute owner. The Court in such cases appoints a day on which repayment of the principal, interest and costs is to be made, and, if such order is not complied with, may compel the mortgagor to convey the absolute title to the mortgagee. On the other hand, the Court may refuse the order for foreclosure, and may make an order that the property shall be sold.

The fourth remedy open to a legal mortgagee is to *take possession of the property himself*, in which case he must collect all the rents at his own expense, but has power to give leases, or to accept surrender of leases, to insure buildings, to cut down timber, to cultivate land, etc. In view, however, of the trouble necessitated, and the fact that the mortgagee must account to the mortgagor for any profits resulting from the possession of the property, this remedy is not applied except as a last resort. An equitable mortgagee cannot exercise this right without the sanction of the Court.

Fifthly, the mortgagee *may appoint a receiver* of the mortgaged property, in order to collect any rents or other income accruing to the estate. This power may be exercised by a legal or equitable mortgagee in the same circumstances as the power of sale, and is to be preferred to taking possession of the land, because, on appointment, the receiver becomes the agent of the *mortgagor*, so that the mortgagee incurs no liability for his acts.

Finally, a legal mortgagee may convert his legal estate into an absolute ownership of the land by virtue of the Real Property Limitation Act, 1874, if he remains in possession for more than twelve years without giving a written acknowledgment of the right of the mortgagor.

It may be added that a mortgagee has, in general, a right to demand that no "fixtures" shall be removed from the land by the mortgagor, even though they can be removed without injury, for such fixtures pass with the land to the mortgagee. The term "fixtures" is applied generally to any articles other than those which are attached to the land merely by their own weight, and includes also articles, such as machinery and plant, which are attached to land or buildings *after* the execution of the mortgage. But a mortgagor in *possession* of the land may, in special circumstances, have a right to remove, or permit the removal of, fixtures which are used and applied in the ordinary course of his trade or business.

• A mortgagee can transfer his mortgage to a third party by deed, and thereby transfer all his rights to recover the mortgage money and interest, and also his right to the legal estate vested in him by the mortgage. Again, a mortgagee of freehold or leasehold property can grant a sub-mortgage of his own mortgage for a few days shorter than the term held by him, but a sub-mortgagee can, of course, acquire no better title or estate in the property than was possessed by the original mortgagee. On the death of a mortgagee, his rights become vested in his personal representatives.

### The Rights of a Mortgagor.

The rights of a mortgagor are now set forth in the Law of Property Act, 1925. The first of these is the right to compel

the mortgagee to transfer or reconvey the mortgage on repayment of the money borrowed, provided that the mortgagor has not lost his right to redeem. This right of the mortgagor is called his *equity of redemption*, and, as already stated, may in some cases be safeguarded by a Court of equity although the right may not be recognised under the common law. The equity of redemption is, however, entirely lost if: (a) the mortgagee forecloses; (b) exercises his power of sale, in which case the mortgagor is merely left with his right to any surplus remaining after repayment of the mortgage money; or (c), the remedy is barred by the Real Property Limitation Act.

The mortgagor cannot deprive himself of his equity of redemption by any contract entered into at any time with the mortgagee, and any agreement made between the parties with the object of defeating the mortgagor's right to recover his land is void as "clogging the equity of redemption". Stipulations in a mortgage will therefore be void which purport to make it absolutely irredeemable, or which provide that the right of redemption is unreasonably postponed, or which give the mortgagee the option to purchase the land at a specified price, or which purport to give him an interest in the property after redemption. This principle is sometimes expressed in the phrase "*Once a mortgage, always a mortgage*".

Secondly, the mortgagor has a right, when in possession of the land, to grant or surrender leases, provided that such power is not negatived in the mortgage deed. Thirdly, he is entitled to any rents or other income of the property, and may take action in his own name to recover rents or otherwise protect the land. In the fourth place, he may inspect and take copies of any title deeds in the mortgagee's possession so long as he has not lost his right to redeem the property. Finally, he has power to pay off one of two or more mortgages given to the same mortgagee, unless the mortgagee has the right to consolidate the charges (see below).

A mortgagor has the right to convey the freehold to another person subject to the rights of the mortgagee, but he cannot, of course, get rid of his *personal* liability to repay the debt merely by making such a conveyance. On the death of a mortgagor his rights vest in his personal representatives.

On repayment of the mortgage moneys, together with accrued interest and costs (if any), the mortgagor is entitled to a return of all the title deeds of the property. Under the old law he was also entitled to a formal *reconveyance* of the property by deed under seal, but the new law makes such a formality unnecessary, providing that the mere endorsement on the mortgage deed of a receipt for the mortgage moneys, etc., will be sufficient to re-transfer the property to the mortgagor. The receipt requires a stamp, which may be either impressed or adhesive, at the rate of 6d. per cent. *ad valorem* on the amount repaid.

Similarly, an equitable mortgagor is at once entitled to the

deeds of property deposited by him as security on repaying the amount borrowed, together with accrued interest and costs, if any, and the mortgagee who is offered repayment has no right to demand notice before delivering up any deeds so deposited.

### The Consolidation of Mortgages.

Prior to the *Conveyancing Act, 1881*, a mortgagee who held two or more mortgages from the same mortgagor, upon *different* property of the latter, had the option of refusing the redemption of one of the mortgages unless the other or others were also redeemed at the same time, the reason being that, if one of several mortgages was redeemed, the mortgagee might be left with a smaller margin of security than if all the advances and all the securities were lumped together. Section 17 of the Act referred to, however, considerably restricted this power in respect of mortgages created after 1882, in which case it is provided that the mortgagee shall have no power to consolidate unless that power is expressly given by one of the mortgage deeds, so that, in the absence of such explicit arrangements, the mortgagor has power at any time to redeem any one of several mortgages which may be outstanding. In view of these considerations, it is usual for bankers to provide in all mortgage deeds that they shall have this power of consolidation in all cases where more than one mortgage is taken by them. The provisions of the *Conveyancing Act, 1881*, now repealed, are re-enacted in Section 93 of the *Law of Property Act, 1925*.

### The Tacking of Mortgages.

Under the old law, it was possible for a *third* mortgagee, without notice of a second incumbrance, to obtain an assignment of a *first* legal or equitable mortgage on the same property and to join both mortgages, thereafter holding them together as a *first* charge over the property, in priority to the rights of the second mortgagee. This right is now abolished, but it is still possible for a *prior* legal mortgagee to tack further advances made by him, so that the total amount ranks as a charge against the estate in priority to any subsequent or intervening mortgages. Thus, a first legal mortgagee who obtains an assignment of a third legal or equitable mortgage can regard the two as one charge in priority to the second mortgage, or in priority to any subsequent legal or equitable mortgages. But this right cannot be exercised unless (a) an arrangement to the effect has been made with the subsequent mortgagees, or (b) the person seeking to tack had no notice of the subsequent mortgages at the time of making a further advance, or (c) the terms of the original mortgage bound him to make further advances, in which case he has the right to tack whether or not he has notice of the subsequent mortgages.

These provisions do not apply to charges over land registered under the Land Registration Act, 1925, nor does the change in the law affect priorities acquired by tacking before the 1st January, 1926.

**NOTICE OF A SECOND OR SUBSEQUENT CHARGE.**—This provision in the new law is of particular importance to a banker who accepts a mortgage as security for a fluctuating debtor balance on current account. A banker who now makes further advances against the security of a charge over land, after receiving express or constructive notice of the giving of a subsequent charge, will have no power to hold the security in respect of the further advances as well as the original overdraft, unless express power to this effect is given in his mortgage deed or memorandum of deposit, or unless an express agreement covering the point is made with the subsequent mortgagee. In the absence of express power to grant further advances, the amount advanced by the bank cannot be increased beyond the amount due at the time when he receives notice of the second or subsequent mortgage. The balance then outstanding forms the limit of the overdraft for the future, and if that limit is reduced by any subsequent payments in, the amount secured is correspondingly reduced and cannot again be raised.

As a rule, power to grant further advances is actually given in the document of charge executed in the bank's favour, but even then it may not be altogether safe for a banker to ignore the creation and existence of a second charge over land held by him as security. It seems fairly clear that advances made by a banker after the creation of the subsequent charge will be protected until he receives *express written notice* of the giving of the subsequent charge. And a banker will not be deemed to have received notice of subsequent mortgages merely because they have been registered either at the Land Registry, or at the Middlesex or Yorkshire County Registries, *subsequent* to the time when such Registries were searched by the banker on making the original advance.

### Mortgages as Security.

The foregoing brief survey will have conveyed to the reader some idea of the important matters which have to be considered by a banker in accepting land as security for advances, and the various contingencies which may have the effect of jeopardising the value and validity of his security. The most important points which arise may now be summarised as follows. In the first place, it must be ensured that the value placed on the property concerned is reasonable in all the circumstances and that an adequate margin is allowed for all contingencies. Secondly, the deeds must be valid, complete and in order, and the document evidencing the bank's charge so drafted as to cover the most



important contingencies likely to arise. Thirdly, if advances have been made against the security of the same property by other incumbrancers, care must be taken to ascertain and to safeguard the priority of the bank's charge. Fourthly, in accordance with the general rules of law dealt with in the preceding pages, the bank must consider the effect on its security of the exercise by the mortgagor of his right to remove, or permit the removal of, fixtures from the property concerned. This matter is not ordinarily of great importance in practice, particularly as a banker is usually well protected by the terms of the charge. Finally, there is the important point that a bank's security over land may be jeopardised if deeds are deposited by a person who, in so doing, acts in fraud of the true owner, as for example, a solicitor who deposits with a bank deeds to which he has no right. In such circumstances, the deeds can be reclaimed by the true owner without repayment of the amount advanced, even though the bank has acted throughout in complete good faith, and without actual or constructive notice of the fraud. But a bank's title to deeds deposited as security will not be invalidated because an agent, who had the owner's authority to raise money on the deeds, has in fact exceeded the authority or limit set by the owner. Under such conditions, the bank can retain the deeds as against the owner until the full amount advanced against them has been repaid.

**LEGAL MORTGAGES.**—Only in exceptional circumstances does a banker go to the trouble and expense of taking a *legal* mortgage as security for an advance, but if he decides to accept such a security several important precautions are necessary. In the first place, no legal mortgage should be taken unless the deeds of the property are deposited at the bank and an independent solicitor has reported that the title of the customer is satisfactory. The next step is to arrange for a careful valuation of the property, either by an independent valuer or by the bank manager himself, a margin of at least 25 per cent. being allowed in all cases. If a banker decides to depend upon his own valuation, he will, of course, proceed on a very conservative basis, and on the assumption that the value must be that which the property would realise in the event of a forced sale. Careful consideration must be given to the possibility of improvement or deterioration of the value of the property in the neighbourhood concerned, while adequate allowance must be made for depreciation and maintenance in the case of houses and other buildings.

The net rental should be ascertained, after due allowance for such outgoings as ground rent, tithes and land taxes. Generally speaking, the security should not be favourably regarded if the net rental value of the property is not *considerably* in excess of the annual charges in respect of the proposed advance. The determination of the net rental is of considerable importance as it forms a reliable basis upon which the banker can estimate the

saleable value of the property, for it is usual to value freehold at an amount equivalent to approximately fifteen or twenty years' purchase of the net rental, and to value leasehold at an amount equivalent to about ten times the net annual rental.

Expert assistance should always be obtained in the case of the valuation of property especially adapted for particular purposes only, as, for example, textile mills, factories of various kinds, warehouses, engineering shops, wharves, mines, and quarries.

Moreover, in any case where a valuation is obtained and an advance\*once granted, periodical revaluations should be conducted at necessary intervals in order to ensure that the overdraft continues to be sufficiently secured. All buildings should be adequately insured against fire, and the premium receipts should be carefully kept at the bank, the customer's written order being obtained for the debit to his account of the premiums as they fall due.

In the case of leaseholds, adequate allowance should be made for the depreciation of the lease, while the receipts for the ground rent should be obtained as the rent is paid and filed with the deeds, arrangements being made, if necessary, for the debit of such rent as it becomes due to the customer's account. The deeds should be carefully inspected to ascertain whether the property is subject to any prior incumbrances, and, in the case of registered land, the banker will take the further steps of inspecting the Register.

If these precautions are properly taken, the banker need have little fear for his security, as the standardised mortgage form now used in all banks protects him against the various eventualities to which reference has been made in the preceding paragraphs. As a rule, a banker's mortgage provides that the money loaned shall be repaid *upon demand*, and that the security shall be a *continuing* one in respect of all monies which may be due or which may become due. In the case of buildings, the mortgagor covenants to keep the property adequately protected against fire, and to produce the receipts for the premiums to the bank. He also gives the banker express power to appoint a receiver or to sell the property upon default, although such power should not be exercised unless notice is first given to the mortgagor and to any other person holding a charge of which the banker has notice.

EQUITABLE MORTGAGES provide a simpler, more speedy and less troublesome mode of securing advances, so long as the banker's usual memorandum is taken and arrangements are made for the deposit of the title deeds. As already stated, the position of an equitable mortgagee who has possession of the title deeds is made even more secure by the new Law of Property, and such a security may take precedence even of an unregistered legal mortgage created *without* the deposit of the deeds. The banker's memorandum of deposit usually confers upon him practically the same remedies as are in the hands of a legal mortgagee, but the power

of sale or foreclosure, or of appointing a receiver, cannot be exercised without the authority of the Court unless the memorandum is given under seal and expressly conveys such rights to the banker. The general defects of an equitable mortgage are that, in general, the title of the equitable mortgage is postponed to that of a prior legal or equitable mortgagee, whether the equitable mortgagee had or had not notice of the existence of such a prior charge. Furthermore, a second equitable mortgagee runs the risk of tacking by a prior legal mortgagee.

SECOND MORTGAGES are not usually regarded by bankers as satisfactory security for advances, for the rights of the second mortgagee are, of course, always subject to those of the first incumbrancer, while there is the danger of tacking by the first mortgagee. If a second mortgage is to be of any great value, the margin between the value of the property and the amounts respectively advanced by the first and second mortgagees must be sufficient to afford the banker a high degree of protection, for, in realising the property, the first mortgagee is not bound to give consideration to the interests of the second incumbrancer, and he may sell the property so much below its real worth that little is left for the later mortgagee. If, however, a banker decides to accept such security, he should take steps to protect himself against tacking by the first mortgagee by giving the latter written notice of his second mortgage, and, if possible, obtaining an acknowledgment with the object of preventing further advances being granted by the first mortgagee, whose actual interest the banker should, of course, immediately ascertain.

**MORTGAGE DEEDS.**—If a banker is offered mortgage deeds as security, he should either take a sub-mortgage or an assignment of the original mortgage in writing. The mortgagor should be given notice, and should be requested to give an acknowledgment thereof, with an indication of the amount still unpaid in respect of the mortgage. The property should also be carefully valued in order to ascertain that the amount borrowed on the mortgage is adequately secured. Once such notice has been given the banker is entitled to have paid direct to him any sum or sums subsequently paid by the mortgagor in reduction of the mortgage money.

### Stamp Duties on Mortgages.

The stamp duty on a mortgage under seal is indicated in Chapter 26. The duty must be paid on the total amount of the debt which is secured, i.e., if a fixed loan is granted, the amount of that loan, or if a limit on current account is arranged, then the amount of that limit. An equitable mortgage *under hand* requires stamping at the rate of 1s. per £100 or fraction of £100 on the total amount secured thereunder, but if it is *under seal*, or if it is under hand and contains a clause granting the mort-

gagee a power of attorney or a power of sale or a power to appoint a receiver, the stamp duty must be at the rate which is applicable to a legal mortgage.

The stamp-duty in all cases must be impressed within thirty days of the execution of the document.

It is sometimes found that the customer wishes to exceed the original amount for which a mortgage is taken, or the original amount for which the memorandum provides. In such cases the document of charge must be forwarded to Somerset House within thirty days of the date on which the original advance is exceeded, so that the necessary additional stamp may be duly impressed. The request must be accompanied by a certificate from the banker specifying the date upon which the excess advance was first taken. If two or more deeds of charge are held by the banker in respect of the same advance, only one of the deeds need be stamped as a primary document to cover the full amount of the overdraft, and the other or others may be stamped at the rate of 6d. per cent. as being *collateral* to the primary document, subject to a maximum duty of 10s. in the case of any one instrument.

A receipt for the mortgage money, given by indorsement on the mortgage, requires a 6d. per cent. *ad valorem* impressed stamp.

### Advances against Mortgages of Ships.

The loss incurred by bankers in this country in consequence of the collapse of the shipping boom which followed the War, clearly emphasised the dangers involved in lending money against the security of ships or shares therein. It would appear that, apart from the ever-present possibility of the rapid depreciation in the value of ships, there are so many risks involved in accepting this form of security that bankers should grant advances there-against only if the circumstances are exceptional, and only after the exercise of the greatest care and the highest degree of caution.

All British ships, with certain unimportant exceptions, must be registered at a Port of Registry, the register indicating the ownership of each of the sixty-four shares into which a ship is divided, and containing also particulars of any charges given by owners in respect of shares. The transfer of any share in a British ship is not valid and complete until a *bill of sale* in the proper form has been registered at the Port of Registry. Similarly, a mortgage over any share or shares must be given in a form prescribed by the Merchant Shipping Act, 1894. One of these forms is intended to secure the principal sum and interest of a loan, while the other is intended to secure a current account. Completion of the mortgage must be followed by registration of the charge at the Port of Registry, the priority of the charge dating from the time when it is registered. A bill of sale of a ship or any share or shares

therein should be clearly distinguished from the ordinary type of bill of sale, referred to at the end of this chapter.

A registered mortgagee of a ship, or of a share or shares therein, has power to take possession if the mortgage money is due and unpaid, or if the ship is being used in such a way as to impair the security. He is also given a statutory power of sale without possession, and the right to give a valid discharge for the purchase money.

Discharge of such a mortgage is effected by indorsing thereon a duly signed and attested receipt for the mortgage money, after which the instrument must be forwarded to the Registrar, who will thereupon record in the Register that the mortgage is discharged.

If a banker proposes to grant an advance against a mortgage of the whole or a part of a ship, his first step should be to search the Register in order to ascertain whether any prior charges exist. Secondly, he should take expert advice as to the value of the ship in order to ensure that the proposed security is adequate. Having satisfied himself on these points, he should take the mortgage on the prescribed form and take immediate steps to have it registered at the Port of Registry, so that his priority may be protected. Furthermore, the marine insurance policy or policies covering the ship or the share therein should, if possible, be transferred into the name of the banker or his nominees, or an assignment of the interest should be indorsed on the policy.

Care should be taken at the original valuation, or at subsequent periodical valuations, that an ample margin is allowed to secure the banker against contingencies. It must be remembered that the value of the security may at any time be seriously diminished on the happening of any event which enables the master and seamen to exercise their right of *lien* over the ship for their wages, or which results in the exercise of certain other maritime liens, as, for example, the lien of the holder of a *bottomry bond*, i.e., a person who has advanced money against the security of the ship in an emergency, and the lien of a salvor or salvors who have saved a ship in distress.

## ADVANCES AGAINST PRODUCE AND GOODS

Conflicting opinions are expressed by various authorities as to the desirability of a banker granting advances against the security of produce and goods, effected not by taking actual delivery of the commodities concerned, but by the deposit or pledge with the bank of such documents of title as bills of lading, delivery orders, warehouse-keepers' certificates, and dock warrants. Earlier writers, such as Gilbart and Hutchinson, emphatically condemn documents of title to goods as undesirable banking securities, but the more modern view—borne out by the frequency with which such security is accepted in practice—is that

such cover is reasonably sound if adequate precautions are taken to safeguard the position of the lender. Moreover, it is not to be forgotten that loans of this type are among those which afford the greatest assistance to the trading community, while at the same time providing bankers, and particularly those in seaport towns, with a highly remunerative and in other ways attractive type of business.

Nevertheless, successful loaning against the security of goods undoubtedly calls for a fair degree of specialised knowledge, for apart altogether from the necessity of ensuring the validity and completeness of the documents themselves, and of dealing so far as is possible with customers of known integrity, there is the further need of taking into consideration the quality, value, and freedom from deterioration of the goods in respect of which the documents are issued. The question of the quality of the goods is clearly of importance if the banker is called upon to realise the commodities which he has accepted as security, while the risk of deterioration must be carefully weighed in cases where a long journey to market is necessary, or where the goods have to be stored for a period before realisation. Perishable goods or goods which are subject to vagaries of demand or of fashion are certainly not suitable as banking securities, while greater protection can be obtained by accepting as security goods in everyday use, capable of a steady sale, than by accepting luxury articles subject to an uncertain or widely fluctuating demand.

In addition, the considerable risk of fraud in connection with the taking of goods as security must not be overlooked, for it is clearly not always easy for a banker to satisfy himself regarding the real value and absolute quality of the great variety of articles which enter into the trade of the country, and which may be offered to him as security. In illustration of this point, Mr F. E. Steele, in *The Banker as a Lender*, quotes an amusing instance in which a bank was asked to grant an advance against the security of a number of cases of sardines, which on examination by a conscientious clerk proved to contain nothing but sawdust. Incidents of this kind can, however, be avoided, and the banker's position in respect of such advances reasonably safeguarded, if produce and goods are accepted as security only from customers of known repute, or if a competent independent valuation of the goods is insisted upon.

But although a banker who proposes to accept produce or goods as cover for an advance should reasonably satisfy himself as to the value of the actual commodities, his first care is to ensure that the property in the goods is clearly and properly conveyed to him by the documents deposited by the customer, for it must be remembered that, although the loans are granted against the security of the actual goods, the security is evidenced essentially by the documents of title which come into the banker's possession. The most important of these documents are described

in the following paragraphs, in which an endeavour is made to bring out the important distinction between documents which are properly regarded as documents of title, and those which are merely receipts or acknowledgments for the goods to which they refer.

### Bills of Lading.

The most familiar and most important document of title to goods is the *bill of lading*, which is a document issued and signed by the master of a ship, or by some other person authorised to sign on behalf of the shipowner, acknowledging that goods specified in the document have been duly received on board, setting forth the terms of the shipment, and embodying an undertaking to deliver the goods to the shipper or his assigns, or to the consignee or his assigns, at the port of destination, provided that the freight and any other charges specified in the bill of lading are duly paid. The following is a specimen of a simple form of bill of lading, although it may be noted that such documents frequently contain much more elaborate clauses and stipulations, with the object of adequately protecting the shipowner.

#### BILL OF LADING

Shipped in good Order and well conditioned by *James White & Co., Ltd.*, in and upon the good Steam Ship called the "*Columbia*", whereof is Master for this present voyage *Robert Sharp*, and now riding at anchor in *Tilbury Docks* and bound for *Buenos Aires*,

*14 chests of Tea, marks TXX, 1-14,*

being marked and numbered as *stated*, and are to be delivered in the like good Order and well conditioned at the aforesaid Port of *Buenos Aires* (the Act of God, the King's Enemies, Fire, Machinery, Boilers, Steam, and all and every other Dangers and Accidents of the Seas, Rivers, and Steam Navigation, of whatever nature and kind soever excepted) unto *Ambrose and Brown* or to their Assigns, *landing charges and Freight* for the said Goods to be paid by the consignees, with *primage and Average* accustomed.

In Witness whereof the Master or Purser of the said Ship hath affirmed to *three* Bills of Lading all of this Tenor and Date, the one of which *three* Bills being accomplished, the other *two* are to stand void.

Dated in London, *7th August, 19..*

*Robert Sharp,*  
MASTER.

Weight and contents unknown.

*This bill is issued subject to the contents of 14 and 15 Geo. V., c. 22.*

Bills of lading for goods to be exported or carried *coastwise* must be stamped with a sixpenny adhesive or impressed stamp before execution, and in default any parties thereto will be liable to a penalty of £50. No English stamp duty is required, however, on bills of lading relating to *imported* goods. As a rule, bills of lading are drawn in sets of three, and, where stamping is necessary, each instrument must bear the correct stamp duty. The object of drawing a bill in a set of three is to enable the shipowner to send

two of the copies separately by different mails to the consignee, and to retain the third copy himself as proof of the shipment. When the goods reach their destination, the consignee or his agent, or any person to whom he has transferred the bill of lading by indorsement, may obtain possession of the goods by presenting the document to the shipping company and paying any charges, such as freight or landing charges, which may be outstanding.

It will be observed that the specimen form of bill of lading provides that when one of the bills is "accomplished, the other two are to stand void", so that if possession of the goods is obtained by the holder of one of a set of bills of lading, the holder of any other part of the set has no claim on the relative commodities. Moreover, the master of a ship or a shipping company is entirely protected on the delivery of the goods to the first person who presents a valid bill of lading and offers to pay the relative charges, provided, of course, that the delivery is made in good faith and without notice of the existence of a prior claim to the goods. If the master has such notice, or suspects that delivery is being made to a wrongful possessor of a bill of lading, or if two persons claim the goods at once, he may apply to the Court to determine to whom the goods really belong.

The term "*through bill of lading*" is frequently used nowadays, and applies to a document which covers the transport of goods by more than one carrying company. Such documents are frequently used in connection with the export of cotton from the United States, and cover transport over the railway from the cotton growing centre to the seaboard, by sea from the port of loading to the port of discharge, and by rail from the port of discharge to the ultimate destination. The object is apparently to provide one document of title which applies to the goods throughout the whole of their journey, from the original loading point to the destination abroad. The documents ordinarily contain provisions whereby the liability of each of the respective carriers is limited to any loss or damage incurred during the time when the goods were under his control.

Although the title to a bill of lading may be transferred by indorsement from one person to another, such a document is not strictly a negotiable instrument, although it possesses some of the characteristics of negotiability. While the transfer of a bill of lading to another person for value may give the transferee a title to the goods which will override any claims of an unpaid seller, the transferee will nevertheless not obtain any title to the instrument, or to the goods which it represents, if it has been obtained from the true owner by fraud, theft, or larceny.

### **Mate's Receipt.**

In certain circumstances when the bills of lading are not available on shipment of goods, a document described as a *mate's*



receipt is handed to the consignor, acknowledging that certain goods specified therein have been received on board for shipment to a named destination. The receipt is signed usually by the mate or chief officer of the ship, and is subsequently given up to the shipowners in exchange for the bills of lading, pending the issue of which the receipt is the only evidence in the hands of the consignor of the responsibility of the shipowners for the goods. The following is a specimen form of a mate's receipt:—

**Specimen Form of Mate's Receipt**

The Southern Steamship Company, Ltd.			
Port of <i>Southampton</i> .		17th June, 19..	
Received in apparent good order and condition on board the S.S. <i>Columbia</i> for delivery at <i>New York</i> subject to the conditions of the Bills of Lading of this line.			
Marks.	Quantity.	Goods said to be	Remarks.
XT 17	14 Bales	<i>Worsted.</i>	.
James Brown, Officer's signature.			
Name of Shipper, <i>Messrs Henry White &amp; Co, Ltd.</i>			

**Dock and Warehouse Warrants.**

In the second important class of documents of title to goods are included *warrants* of various kinds issued by dock companies, warehouse-keepers, or wharfingers, stating that goods named and described therein are deliverable to the person named in the warrant, or to his assigns by indorsement. As a rule, a dock warrant is issued in favour of the person depositing the goods, and embodies an undertaking by the issuers to deliver the goods to the depositor or to his assigns. Assignment of such documents is effected by indorsement thereof followed by delivery to the assignee, but if the instrument is indorsed in blank, the title thereto and also to the goods will pass by mere delivery.

Although warrants for goods are transferable in this manner, they are not negotiable instruments, so that any transferee thereof will be affected by any defects in the title of his transferor. It must be remembered also that, although a warrant passes the title in the goods concerned, it does not operate as a transfer of possession. Consequently, as a dock company or warehouse-keeper cannot be compelled to hold goods on behalf of any person other than the original depositor with whom the contract of

deposit was first made, it is advisable that anyone to whom such a document is transferred should at once give notice of his claim to the holders of the goods, so that a new warrant may be issued in his name.

All warrants, or documents in the form of warrants, signed by persons having the possession or custody of goods, must bear a 3d. impressed or adhesive stamp. The following are specimen forms of such warrants :—

### Specimen Form of Dock Warrant

SOUTHERN DOCKS COMPANY.		
Dock Lot No. 173.	17th June, 19..	
Warrant for 14 chests Tea imported in the ship <i>Columbia</i> Master <i>James Brown</i> , from <i>Calcutta</i> entered by <i>William Arnold &amp; Sons</i> on the 12th June, 19.., deliverable to <i>Thomas Robinson</i> or assigns by indorsement hereon. Rent commences on the 12th June, 19.., and all other charges from the date hereof.		
Rate charged.		
Marks and Numbers.	Landing Weight.	
	Gross.	Tare.
TXX 1-14	15 c. 50 lbs.	14 c.
Ledger No. 17.	Folio 273.	
<i>John White, Clerk.</i>	<i>Henry Atkins, Warrant Clerk.</i>	

### Specimen Form of Warehouse Warrant

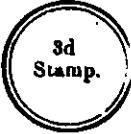
TEA WAREHOUSE.	
No. 1793.	Warrant.
For 14 Chests of Tea Imported in the ship <i>Conquest</i> from <i>Calcutta</i> Captain <i>Thomas Robinson</i> entered by <i>James White and Son</i> on the 12th June, 19..	
Rent payable from the 12th June, 19..	
Examined and entered by <i>Henry Brown</i> . Ledger folio 174.	
LONDON, 17th June, 19..	
Deliver the above-mentioned goods to <i>William Brown</i> or assigns, by indorsement hereon.	
<i>Andrew Bennett,</i> WAREHOUSE-KEEPER.	
This warrant must be presented at the office, regularly assigned by indorsement, and all charges paid, before delivery of the goods can take place.	

**On the Back is printed :**

Deliver the within-mentioned goods to \_\_\_\_\_ or order.

**Warehouse-keepers' Receipts and Certificates.**

These are documents issued by warehouse-keepers, stating that the goods specified therein were deposited on a particular date by a person named, and that they are held at his disposal. Such documents are merely receipts or acknowledgments for the goods concerned. They are not documents of title, for possession of the goods may be obtained without surrender of the certificate or receipt, and it is usually stated on such documents that they are not transferable. Possession of the goods may be obtained by the owner on signing and forwarding to the warehouse-keeper a *Delivery Order* in the form shown below, or he may exchange the receipt for a warehouse warrant transferable by indorsement. A warehouse-keeper's certificate is usually stamped with a 3d. impressed or adhesive stamp, although it is not altogether clear as to whether a stamp is actually required by law, and some such documents are issued without being stamped. The following is a specimen of such a document :—

<b>WAREHOUSE-KEEPER'S CERTIFICATE.</b>	
ST CATHARINE'S WAREHOUSE, EAST INDIA DOCK.	
No. 1702.	
Not transferable.	
To: <i>Messrs James Brown and Son.</i>	
We hold at your disposal in the above warehouse as per conditions at the back hereof 14 chests Tea ex. <i>S.S. Columbia.</i>	
<i>Henry White and Co.,</i> <b>WAREHOUSE-KEEPERS</b>	

**Delivery Orders.**

A *Delivery Order* is a document addressed by the owner of goods to the proprietor of a dock or warehouse in which the goods are stored, instructing such proprietors to deliver either all or some of the goods to a specified person or to his assigns. Although such a document is not strictly a document of title and does not require stamping, it is nevertheless necessary in order to enable a third party to obtain goods which have been deposited at a dock or warehouse, and should, in any case, always accompany a warehouse-keeper's certificate or receipt, if such a document is to be relied upon as a security. The following is a specimen form of delivery order :—

## DELIVERY ORDER.

No. 1793.

BONDED WAREHOUSES,  
17th June, 19..To the Superintendent at H.M. Customs.  
Warehouse No. 16.

Please deliver the undernoted 14 cases entered by *Henry Brown & Co.*, on 1st June, 19.. ex. S.S. "*Marguerite*" from *Aberdeen*, to the order of *James Brown* or assigns by indorsement hereon, on payment of rent and charges from 1st June, 19..

MARKS : TXX.

Nos. : 1-14.

CONTENTS : *Whisky.*

ENTD : T.B.

*James White & Co.***Taking Goods as Security.**

Goods represented by the relative documents of title will be taken by a banker as security in one of two chief ways, either (a) *directly* as security for an advance on current account ; or (b) as security for the due payment of bills of exchange discounted or accepted by the banker on behalf of his customer. In the first case, the goods will constitute a *direct* security for a due payment of the advance, whereas in the second case they are merely a *collateral* security for due payment of the bill.

Apart from the general considerations to which reference has already been made, a banker accepting such security will have regard to three important points : (a) the validity and completeness of the documents ; (b) the nature, quality, and value of the goods, and (c) the rights of any persons who may have claims against the goods, including the seller, the buyer, and the person having possession of the goods for the time being.

In examining the documents the banker will ascertain that they purport to be complete and in order, and that they are properly stamped, where stamping is necessary. In view of the considerations referred to, care will be taken to distinguish between documents which in themselves give a title to the goods specified, e.g., bills of lading and dock warrants, and documents such as warehouse-keepers' receipts and certificates, which are merely acknowledgments of the deposit of goods in a named warehouse.

Wherever possible, bills of lading accepted as security should be drawn "to order or assigns", so that they may be transferred by indorsement to the banker. They should be closely examined to ascertain whether they contain clauses which may necessitate the payment of heavy charges to the shipper, or which may otherwise operate to the detriment of the lender. Moreover, in considering a bill of lading, it must always be remembered that,

while the document is conclusive evidence of the shipment of goods as against the person who has signed it, it affords no evidence either of their quality or value, although the lender may protect himself in regard to these matters by insisting upon the deposit of an invoice showing the value and description of the goods referred to in the bill of lading. Further protection in this respect will be obtained by ensuring that the bill of lading is accompanied by the relative marine insurance policy or certificate of insurance, provided that it is seen that the description of the goods in the policy agrees with that given in the bill of lading. It should also be ascertained whether the bill of lading acknowledges that the goods are shipped "in good order and condition", for the shippers may qualify their acknowledgment of the shipment by stating that the goods or the packages were in some way defective at the time of their receipt on board.

Wherever possible, a banker advancing against the security of bills of lading issued in sets should arrange for the deposit with him of all parts of the set, so as to ensure that the goods cannot be claimed by any person to whom one of the parts may have been fraudulently transferred. If all the parts cannot be obtained immediately, notice of the banker's claim over the goods should be given to the shipowners, or if the goods have been delivered by them, to the dock company or warehouse-keeper. Finally, the banker should take steps to ensure that the goods are adequately insured against fire and theft at any place where they are stored, arranging if possible to have the insurance effected in his own name, subject to the debit of the premiums to the account of the customer obtaining the advance.

Dock or warehouse warrants taken as security by a banker should be indorsed in blank, and arrangements should be made for the goods concerned to be insured against fire and theft at the expense of the borrower. If a warehouse-keeper's receipt or certificate is taken, it should be accompanied by a delivery order made out in favour of the banker, so that he can obtain possession of the goods and have them stored in his own name. In any case where the banker does not take steps to register himself as owner of the goods, he should lodge a "*stop order*" with the dock company or warehouse-keeper holding the goods, in order to prevent unauthorised dealing with the articles by the customer or third parties. As in the other cases, the goods should be insured against fire and theft at the expense of the borrower. The registration in the banker's name of goods specified in a warehouse-keeper's certificate or receipt is of particular importance if the banker is to be protected in the event of the bankruptcy of the borrower. Whereas possession by the banker of a bill of lading, or dock warrant, or warehouse *warrant*, is sufficient to take the goods concerned out of the order and disposition of a bankrupt customer so as to defeat the claim of his trustee, a warehouse-keeper's receipt or certificate has no such effect, so that, in the event of the bank-

ruptcy of the borrower, the goods may be claimed by the trustee as being part of the bankrupt's estate.

In regard to the goods covered by documents deposited with him as security, the banker will naturally take such steps as he considers necessary to inspect them as soon as possible in order to satisfy himself as to their value and quality. In special cases the assistance of an expert valuer may be necessary, particularly where the commodities are of special kind or have to be held for a long period. Revaluation at intervals should, of course, be arranged wherever it appears to be desirable in the banker's interests.

### Rights of Third Parties against the Goods.

The general rule of law is that no person can acquire a better title to goods than that possessed by the person from whom he received them, except where goods are sold in *market overt*, i.e., in any place regarded as a public market by virtue of old established custom. Fortunately, this general rule is considerably modified in special circumstances by the Factors Act, 1889, and the Sale of Goods Act, 1893, otherwise documents of title to goods would unquestionably be undesirable as bank securities, by reason of the fact that a banker cannot in practice always ascertain whether or not the customer's title is defective in any particular instance.

The principal circumstances in which the banker's security over goods may be prejudiced by rights of third persons arise where an advance is granted to a buyer who has not paid the seller what is due to him in respect of the transaction. In such circumstances, the unpaid seller may exercise one of two rights: (a) he may exercise a *lien* over the goods if they have not left his possession; or (b), if the buyer has become insolvent, he may exercise the right to stop delivery of the goods provided they are still in transit to the buyer. This right is known as the seller's *right of stoppage in transitu*.

The seller's *right of lien* can be exercised only if the goods have not left his possession, and the right is lost (a) if the goods have been delivered to a carrier or other bailee for transmission to the buyer without the seller's reserving any right of disposal; (b) if the seller has waived his right of lien; or (c) if the buyer or his agent lawfully obtains possession of the goods.

On the other hand, the right of stoppage *in transitu* can be exercised only if the goods are actually in transit to the buyer, and the latter has become insolvent. It is, however, not always easy to determine when goods are to be regarded as being still in transit, for the seller must reclaim them before they have reached the buyer's actual or *constructive* possession. Constructive possession is, of course, a question of fact, but goods will not be regarded as having reached the buyer merely because they

have been deposited in a warehouse at the place of destination. In such circumstances, they do not reach the buyer's constructive possession until the warehouse-keeper or carrier informs the buyer that the goods are being held at the warehouse on his account. The right of stoppage will also be lost if the buyer or his agent obtains possession of the goods during transit, or if the carrier acknowledges to the buyer that the goods are being held at his disposal.

As a rule, a banker who advances against the security of documents of title to goods is adequately protected against the foregoing rights of an unpaid seller, by virtue of Section 47 of the Sale of Goods Act, 1893, which provides as follows :—

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was made by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

Thus the seller cannot exercise his right of lien or right of stoppage *in transitu* if the buyer has obtained the documents of title from the seller in good faith, and has transferred them to, or pledged them with, an innocent third party for value. But it is essential that the documents shall have been received by the buyer *with the seller's consent*, whether that consent has been obtained fraudulently or not, provided that the documents were not obtained by a trick amounting to larceny, in which case the seller's right of lien or stoppage will be unaffected, even if the documents have been taken by an innocent third party for value. The meaning of *larceny by trick* was defined by the Court of Appeal in the case of *Whitehorn Brothers v. Davison*, 1911, in the following terms: "If, as the result of a trick, the person defrauded intended to part with both the possession and the property in the goods, the offence is false pretences, but if he is induced merely to part with the possession of the goods and does not intend to part with his property therein, the offence is larceny by trick."

It follows therefore that a banker's rights over goods, or the documents of title thereto, pledged by a buyer or importer, will not be invalidated unless the seller can set up *and prove* this defence of larceny by trick. For most practical purposes the risk in this respect is negligible.

## Goods Given as Security by Mercantile Agents.

Further important circumstances in which a banker may have to recognise the right of the true owner to goods deposited with him as security, arise when goods, or the documents of title thereto, are pledged with him by a *mercantile agent*, as defined in Chapter 7. Adequate protection to the banker is afforded, however, if he can bring himself within the scope of Section 2 (1) of the Factors Act, 1889, which provides as follows:—

2. (1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

By virtue of these provisions, a banker is protected if goods or documents of title pledged with him have been obtained from the owner with his consent, i.e., have not been obtained from such owner by a trick amounting to larceny. The true owner will not be entitled to reclaim the goods or the documents of title merely because they were obtained from him by false pretences or by mistake. At the same time, the provisions of Section 4 of the Act are of particular importance in this connection, for—

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

Thus a banker who accepts as security goods, or documents of title to goods, from a mercantile agent in respect of an *existing* overdraft, will not be entitled to retain such goods or documents as against the true owner if it should afterwards be shown that the pledgor had no right to the articles concerned, or that the seller had a right of lien or stoppage *in transitu* against them.

## Letters of Hypothecation.

In practice, customers depositing documents of title to goods with a banker as security for an advance, or as security for the due payment of bills discounted, accepted or indorsed by the bank, are required to sign a document of charge described as a *Letter of Hypothecation*.

The Letter of Hypothecation pledges the documents of title with the banker as security, authorises him to deal with the goods in any way which may be necessary, to sell them if he deems fit, and to apply the proceeds in repayment of any advance or payment made by him on behalf of the pledgor. Such a



memorandum of charge is specially essential in circumstances where the documents are not made out "to order or assigns", and the banker is not able to obtain a clean title by mere delivery. Moreover, a memorandum of this kind is essential to support the banker's claim to the relative goods or the documents of title thereto, in cases where he does not deem it desirable to append his own signature to documents lodged with him as security, in view of the risk that he may be involved in liability to parties of whose interests he is unaware.

### Trust Receipts.

Customers who have obtained advances from a banker on the security of goods or of documents of title, are frequently unable to repay the amount borrowed until they realise the goods and obtain payment of the proceeds. As possession of the documents of title is essential before the goods can be obtained from the shipping company, dock company or warehouse-keeper by whom they are held, bankers sometimes arrange to release the documents to the customer against his signature to an instrument known as a "Trust Receipt", a specimen of which is given below:—

#### TRUST RECEIPT.

To THE NORTHERN BANK, LIMITED,  
Lombard St.

7th June, 19..

GENTLEMEN,

We have to acknowledge receipt of invoice, bill of lading and insurance policy representing:—

29 chests Tea, ex S.S. "Columbia", marks TX 1-29.

We receive the above in trust on your account, and undertake to hold the goods when received, and their proceeds when sold, as your trustees. We further undertake to deal with this transaction separately from any other and to remit you direct the entire net proceeds as realised, but not less than £200, within seven days from this date. We undertake upon your written demand, to be made at any time, forthwith to return the documents or the goods to you, or, if not in our hands, the value thereof.

We also undertake to keep the goods fully insured against fire, and to hand over to you any and all amounts received from the insurers, the policies of insurance being, in the meantime, held by us as trustees for and on your behalf.

JAMES SHARP & SON,  
14 ST ANDREW'S COURT, E.C.3.

It will be observed that by this agreement the customer hypothecates the documents to the banker as security for the advance, and undertakes to hold them and any proceeds received in respect thereof as a trustee for the banker, in whose name the goods are insured and warehoused.

## BILLS OF SALE

A bill of sale is a document under seal by which the property in personal chattels is transferred or mortgaged by one person to another as security for a debt. If the instrument gives the grantee an absolute assignment of the goods and chattels concerned, it is described as an *absolute bill of sale*, in contradistinction to a *mortgage* or *conditional bill of sale*, which merely passes the property by way of security for a debt or advance, and authorises the creditor to sell the goods named therein if the debt or advance is not repaid by a specified date, and to reimburse himself out of the proceeds. Absolute bills of sale are governed by the Bills of Sale Act, 1878, and are not important for our present purpose, but mortgage bills of sale, which are sometimes taken by a banker, are subject to the Bills of Sale Act, 1882.

A mortgage bill of sale intended as security for an advance must be substantially in accordance with the form prescribed by the Bills of Sale Act, 1882, and must expressly state the consideration for which it is granted, which must not be less than £30, and also the chattels to which it refers. For the purpose of the Act, "personal chattels" are stated to include goods, furniture and other articles capable of complete transfer by delivery, also fixtures and growing crops (in certain circumstances) and trade machinery. But the term does not include *choses in action*, such as stocks and shares, or interests in real estate or fixtures other than trade machinery.

In order to be valid, a bill of sale taken as security must be registered within seven days of its execution at the central office of the Supreme Court, and the registration must be renewed every five years if the security is to continue. Provided a bill of sale is duly registered in the manner prescribed by the Act, registration of any subsequent transfer or assignment is unnecessary. If two or more conditional bills of sale are given in respect of the same chattels, their priority is determined according to the date of registration.

Bills of sale are not a desirable form of banking security, for whether such an instrument is taken by the banker himself, or is given by his customer to a third party, its execution is usually regarded as an indication that the grantor is financially embarrassed. If such a document is accepted, however, the banker must take precautions to ensure that all requirements of the Act are properly complied with, otherwise the security will be rendered void. He should particularly guard himself against the facts that a bill of sale will be invalid if it is given to him by a person who has been adjudged bankrupt, or by a person who to the banker's knowledge has committed an act of bankruptcy within three months preceding the date of the bill of sale, or if the bill of sale can be regarded as being a fraudulent preference over other creditors of the grantor.

The remedies of the holder of a bill of sale as set forth in Section 7 of the Bills of Sale Act, 1882, are to seize the goods and chattels covered by the charge if the grantor (*a*) fails to make repayment on the prescribed date; (*b*) becomes bankrupt; (*c*) fraudulently removes the goods from the place specified by the instrument, in which they are stated to be; (*d*) without reasonable excuse, fails to produce his last receipts for rent, rates and taxes, and (*e*) has execution under a judgment levied against the goods and chattels comprised in the bill of sale.

## CHAPTER 25

### THE SAFE CUSTODY OF A CUSTOMER'S VALUABLES

ONE of the much appreciated facilities which a banker offers to his customers is that of keeping in safe custody valuables of various kinds, including negotiable securities, jewellery, boxes of plate and documents of title to property. The safes and strong-rooms with which the banker must be provided for the purposes of his business, form a very convenient and safe place of storage for property which customers desire to safeguard from fire and theft, and thus we find that the custom of depositing such property in the hands of bankers for safe custody dates back to the time when the merchants in the City of London left their gold and valuables in charge of the early goldsmiths.

As a general rule, property which is thus left with the banker for safe custody is deposited in a locked box, the key of which is kept by the customer, or, if it consists of deeds or securities, it may be enclosed in an envelope which should be sealed with the customer's recognisable seal. The name of the customer usually appears on the outside of the box or envelope, but in the majority of such cases, the banker is given no precise information regarding the contents. In the case of negotiable securities such as bearer bonds, however, it is usual for them to be left with the banker uncovered, particularly where he is required from time to time to detach the coupons and to present them for payment.

#### Receipts for Articles Left for Safe Custody.

The majority of banks in this country issue to customers a special form of receipt in respect of all articles lodged for safe custody, and require that the receipt shall be returned to the banker duly discharged by the customer before the articles deposited can be withdrawn. Moreover, it is usually provided that the depositor shall attend *in person* at the bank in order to withdraw the articles, and, if he is unable to do so, he is required to sign an order on the back of the receipt instructing the banker to deliver the articles to the bearer of the document. The following is a typical specimen of such a receipt, and, it will be noted, is signed on behalf of the bank by the Manager or, in his absence, by the Accountant.

Specimen Receipt for Safe Custody Articles.

This receipt should be kept in a place of safety. The Security referred to herein can only be given up on the surrender of this receipt bearing the signature of the depositor at the foot hereof, or, if unable to attend personally, to the authority endorsed at the back. It is particularly requested that wherever possible personal application should be made.

No. 88923.

NORTHERN BANK LIMITED,

NORTTOWN BRANCH, 5th June, 19..

(Perforation)

Received from F. E. Williams, Esq., .....  
Cert. No. 58518 for 30 £1 Ordinary Shares Bleachers' Association, Ltd., Nos. 18509-18598.....  
.....

Per pro. NORTHERN BANK LIMITED,  
C. J. CLARKE,  
Manager.

Received from NORTHERN BANK LIMITED the above-mentioned Securities.

(Signature)..... Date.....19..

Back of the Receipt

TO THE MANAGER,

NORTHERN BANK LIMITED,

NORTTOWN BRANCH.

Please deliver to Bearer the Securities mentioned on the other side.

Signature.....

Residence.....

Date.....

As a rule a receipt in the foregoing form is taken from a Safe Custody Receipt Book, and is detached from a counterfoil which the customer is required to sign on depositing the valuables. By so doing he not only acknowledges that the articles deposited by him are as stated on the counterfoil, but also provides the receiving banker with a specimen of his signature, which can, of course, be compared with that signed on the receipt when the articles are withdrawn.

If articles are deposited in the names of two or more persons all of those persons should be required to sign the counterfoil and the Receipt should be made out in the names of all the parties. Articles so deposited should not be returned except against the signature of *all* the depositors, and in the event of the death of one or more, it is probably in the banker's interest to ensure that the personal representatives of the deceased concur in the withdrawal before delivery is made to the survivor or survivors. On the other hand, the Council of the Institute of Bankers suggest that upon proper proof of the death of one of two or more parties in whose joint names valuables are deposited, delivery may be made to the survivor or survivors, provided the bank has no notice that the valuables are held by the parties as trustees. (See *Questions on Banking Practice*, No. 1512.)

Similarly, articles lodged for safe custody on behalf of a partnership, limited company, local authority, or other body should be accepted only if the counterfoil is signed by duly authorised officials, while the return of valuables in such cases should be made only against the signature of persons who are properly authorised to act on behalf of the body concerned, although such persons need not necessarily be those by whom the valuables were originally deposited.

In the case of trustees, the banker should take particular care to see that the valuables are deposited in the names of all the trustees, and that the signatures of all are obtained to the counterfoil. In no circumstances should one or some of several trustees be permitted to withdraw or to handle valuables deposited in the names of all, unless the signed authority of all the trustees is first obtained. Moreover, if one of several trustees is given the authority of all trustees to deal with valuables for safe custody in a certain way, the banker acting on such authority should see that its terms are rigidly complied with and not exceeded. Thus, in the case of *Mendes v. Guedalla*, 1862, one of three trustees had the possession of a key of a box containing bearer bonds lodged for safe custody with the bank in the name of the trustees, and had authority to cut off the coupons half-yearly in order to present them for payment. The banker was held liable for having parted with the box and for having permitted the trustee to remove articles other than the coupons without the authority of the two remaining trustees.

On the death of the person in whose name articles are left with a banker for safe custody, the banker should not permit dealings with the property except by the personal representatives *after* production of the probate or letters of administration, although the banker should not object to the examination of the articles in his presence by persons properly interested, as, for example, near relatives of the deceased. Thus, if a near relative of a deceased calls at the bank and asks to be allowed access to a box held in the name of the deceased, the banker should not

object to an examination of the contents in his presence. If a will is contained in the box, it may be handed over against the signature of all the executors mentioned therein, but any other documents should not be transferred until probate is produced, and the authority of all the personal representatives obtained. If several executors are named in a will, the signature of one should not be accepted on behalf of all in acknowledgment of the delivery of articles lodged for safe custody in the name of a deceased.

On the bankruptcy of a person who has deposited articles with the banker for safe custody, the banker should obtain the permission of the Official Receiver or of the trustee before releasing the articles, and will be safe in accepting the signature of the official receiver or the trustee as an authority for the withdrawal.

### The Register of Valuables for Safe Custody.

In most banks full particulars of all articles lodged for safe custody are recorded in special registers kept for the purpose. In the case of locked boxes, the contents of which the banker is not presumed to know, it is usual to record the particulars in a *Register of Boxes*, the boxes being given consecutive numbers and the name of the depositing customer being painted on or affixed to the outside of the relative box. A somewhat similar procedure is adopted in the case of sealed envelopes or parcels, the contents of which are not divulged at the time of deposit, a consecutive number being given to each envelope or parcel, and the customer's name printed in bold characters on the outside.

More precise particulars are taken in the case of bearer bonds or other negotiable securities which are lodged for safe custody. Full details of such articles are recorded under the name of the depositing customer in a *Register of Securities for Safe Custody*, which in appearance is somewhat as follows:—

#### REGISTER OF SECURITIES FOR SAFE CUSTODY

JAMES BROWN, Grocer, 17 East Street, Northtown.

Date.	Initials	Folio in R/C.	Nominal Amount.		Description of Stock.	Number of Receipts Issued.	How disposed of.	Initials
			Bonds.	Certs.				
19.. Sept. 17	R.C. J.F.	13	..	£30	30 Bleachers' Assn. 21 Ord. Shares. Certificate No. 42176.	54	Returned 18th April, 19.. Receipt No. 15.	R.C. J.F.
19.. Mar. 4	R.C. J.F.	21	\$100	..	30 Mexican Eagle Oil 25 Ord. Shares. Bonds Nos. 76433-76444.	54		

It will be observed that particulars are recorded of the description and nominal value of the security, while columns are provided for the number of the receipt issued and for the initials of the

officers responsible for accepting the deposit and verifying the correctness of the entry in the Register. Upon the return of the security an entry such as "Returned, 15th April, 19.. Receipt No. 15" is made in the column headed "How disposed of", followed by the initials of the officers responsible for the surrender. Each returned receipt is given a consecutive number (i.e., 15 in the example) and is filed away in numerical order so that it may be referred to if necessary, and examined by the Inspector at the periodical inspection of the branch.

In the event of the receipt being lost by the customer, he is requested on withdrawing the articles either to give another receipt, or to sign his name opposite the relative entry in the Register. As a rule, a third party who withdraws articles belonging to a customer under a letter of authority or by virtue of the customer's instruction on the back of the receipt, is required to sign the Register, the customer's letter of authority or instruction being carefully filed away with the other receipts for articles withdrawn.

### The Banker as Bailee.

In taking charge of a customer's valuables for safe custody, the banker undertakes the obligations of a *bailee*, i.e., a person to whom goods are delivered in trust under a contract, to be held until reclaimed by the depositor, who is described as the *bailor*. The contract thus entered into between the bailee and the bailor is legally referred to as a *bailment*, and is defined as "a delivery of goods on an express or implied condition that they shall be returned by the bailee to the bailor, or otherwise dealt with according to his directions, as soon as the purpose for which they were delivered has been fulfilled". No property in the goods thus deposited passes to the bailee; his capacity is merely that of a warehouseman or custodian of the goods for the person depositing them, and his liability for loss or theft of the articles depends upon whether he renders the service gratuitously, i.e., free from any charge or profit, or whether he is paid for his trouble.

A person who undertakes the safe custody of valuables simply to oblige and without receiving any payment for the service is known as a *gratuitous bailee*, whereas a person who makes a special charge for the service, or obtains any profit therefrom, is described as a *bailee for reward* or a *bailee for hire*. The distinction is material because the liabilities and obligations of a bailee for reward are more onerous than those of a gratuitous bailee. Whereas a gratuitous bailee is bound to use only the best means and facilities at his disposal, a paid bailee is bound to provide himself with the best safeguards known to practical science. A paid bailee is in the position of an expert, and is relied upon as such, whereas a gratuitous bailee does not want the safe custody of the goods, but if they are left with him he must do his best



in the circumstances. It is thus of some importance to determine to which of these classes the banker belongs, otherwise it is not possible to form a correct estimate of the liabilities and duties which he assumes by taking care of valuables on behalf of his customers.

If the banker is *specifically* paid for taking care of articles left for safe custody, he is, of course, in the position of a bailee *for reward*, and, as such, his failure to display the requisite degree of care will constitute negligence for the consequence of which he will be responsible to his customer. Accordingly, he must take every reasonable means to safeguard the property entrusted to him, and with this object must provide himself with the most effective appliances possible. As a paid bailee, a banker is bound to take *expert* precautions against loss or damage to the relative goods.

It is more difficult to define the banker's position in the ordinary state of affairs, where he receives no special payment for his services, and no definite arrangements are made with the customer when the account is opened. Unfortunately, there is no agreement among the authorities as to whether the banker in such circumstances is a gratuitous bailee or a bailee for reward. Sir John Paget maintains that the banker is properly regarded as a *gratuitous* bailee, and this opinion would no doubt be endorsed by the Council of the Institute of Bankers.

If this view is correct, the banker, as a gratuitous bailee, is liable to his customer only for loss arising from his *gross* negligence. This does not mean that the banker can act carelessly over the safe custody of valuables, or that he shall not exercise his best skill in safeguarding the property left in his care. "If a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence" (*Shiells v. Blackburne*, 1789). "He is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description" (*Giblin v. M'Mullan*, 1868). Unquestionably, a banker is imputed with high qualities of care and caution in safeguarding the property of others. "The banker publicly professes the art of taking care, which may indeed, be considered the historical origin of his other functions, and negligence which, in the case of another person might be unrecognisable, would be appalling in the case of a guardian of credit and capital".<sup>1</sup> It follows, therefore, that even if a banker is to be regarded as a gratuitous bailee, he would be liable if he had failed to take all precautions which his experience had shown were usual and necessary.

Other eminent authorities, including Dr Heber Hart, maintain that a banker is a bailee *for reward* because he makes a profit by keeping a customer's account, and because one of the con-

<sup>1</sup> Hart, *Law of Banking*, page 608.

siderations by virtue of which customers open or continue their accounts at a bank is that the banker will at any time accept their valuables for safe custody in accordance with long established practice. In support of this view it is argued that, upon opening an account, a new customer knows from the advertisements and literature of the bank that he will have a right to leave his valuables in the hands of the bank for safe keeping, and that he will be able to obtain the benefit of the modern protective devices at the disposal of the bank for the safeguard of his property from fire or theft. On his part, the banker knows that customers will expect this service, and he lays himself open to act as a bailee of the customer's property because he expects to derive some benefit from the existence of the account.

The matter remains to be settled by the Courts, but, whichever view is accepted, it cannot be denied that the service rendered must be regarded as being more than mere courtesy, for there is little doubt that the refusal of a banker to accept a customer's valuables for safe custody would be followed in the majority of cases by the removal of the account to another bank. Moreover, this service is one which bankers do not usually place at the disposal of persons who are not customers, and presumably a charge would ordinarily be made by a banker who was asked to undertake the safe custody of articles belonging to outside parties. Nevertheless, it must be remembered that a customer cannot *compel* a banker to take charge of his valuables.

It is generally stated that the difference in respect of a banker acting as a gratuitous or a paid bailee is that in the former case he is liable for gross negligence, whereas in the latter case he is liable only for *ordinary* negligence. But as we have seen, even if the view that a banker is a gratuitous bailee is accepted, he must take the same degree of care of the goods as a reasonably prudent man, with the same facilities at his disposal, would take of goods of his own of the same description. The distinction is, therefore, not of great practical importance, for most bankers have for their own protection all such appliances as would usually be regarded as necessary for a paid bailee.

It will be clear, however, that a bailee for reward is regarded at law as accepting a greater liability than a gratuitous bailee, and for this reason it is generally maintained that a gratuitous bailee has no insurable interest in the goods entrusted to him for safe custody, whereas a bailee for reward has such an interest. The point has never been decided so far as a banker is concerned, but it is of practical importance in so far as he will not be able to obtain the protection of insurance against fire and theft of articles left with him for safe custody unless from the circumstances he is to be regarded as a bailee for reward.

Moreover, whether the banker is regarded as a gratuitous bailee or a bailee for reward, he must return the articles to the

depositing customer upon demand *but to no other*, and, if through his negligence the articles are stolen or otherwise lost, or if he delivers them to a third person without being authorised to do so by his customer, he will be liable to make good their value. On the other hand, the banker does not *insure* the safety of goods thus entrusted to him, so that if the goods are lost in spite of the fact that he has exercised every possible care, he will incur no liability to the party depositing. This is so even if the goods are lost or fraudulently dealt with by one of the bank's employees, provided that the bank itself can show that it has acted without negligence.

As a rule, the banker does not incur any special liability in respect of valuables for safe custody on account of his knowledge or lack of knowledge of the nature of the goods; thus, the fact that goods of a certain character have deteriorated in keeping in spite of the efficiency of the banker's storage accommodation, would not involve him in liability unless it could be shown that he had been unreasonably or imprudently negligent.

Apparently, articles are left by customers with a banker on the implied condition that they shall be kept on the banker's own premises and not elsewhere, such as at a depository under the control of third parties. On these grounds, a banker will be held liable for the loss, destruction or damage of articles entrusted to him for safe keeping which he deposits elsewhere than on his own premises, quite apart from any question of negligence. In such circumstances, his liability arises from breach of one of the conditions of the contract of deposit between the banker and his customer.

Finally, it should be noted that a bailee of goods has no better title thereto than the bailor, so that if the latter has obtained goods or securities from another person by fraud, the true owner will be able to sue the bailee for their return even though the bailor's authority for withdrawal is not obtained.

### The Return of Goods Left for Safe Custody.

As has been pointed out, the banker will render himself liable if he returns to the wrong person valuables which have been deposited with him for safe custody, and it is for this reason that he should take every care to satisfy himself concerning the genuineness of the signature to an instruction for delivery of articles left for safe custody, for he will certainly be liable to his customer if, in returning such property, he acts upon a signature which is forged or unauthorised. Accordingly, in the case of any doubt as to the authority of a person who presents an order for delivery of articles left for safe custody, the banker is justified in obtaining the customer's confirmation of the request for withdrawal. If a demand for withdrawal is presented by a third party, danger of mis-delivery may be avoided if the banker

insists upon sending the articles by a member of his own staff to the customer's own house or place of business.

The articles returned must accord in description with the articles deposited. Thus, if uncovered bearer bonds are left with the banker, the instruments returned must be identical in description and value with those which were deposited. But a banker is in no degree liable for the contents of a locked box or a sealed envelope, unless in the case of a box the contents are specifically divulged to him at the time of the deposit and the key is left in his hands.

### Valuables for Safe Custody and Third Parties.

If a customer gives an authority to a third party to obtain access to a box or parcel deposited at a bank for safe custody, the banker should see that the terms of the authority are strictly complied with. Thus, if the customer merely authorises the third party to *inspect* the documents or contents, the banker should ensure that the contents are examined in his presence and should see that nothing is removed and that nothing is altered or damaged. Moreover, if the authority permits the third party to remove a particular article from a box or parcel, the banker should see that only the specified article is taken away.

Accordingly, a solicitor who has the customer's authority to inspect the contents of a box deposited by him should not be permitted to remove any of the contents, or to alter any documents without the customer's express consent, or to remove the box from the bank, even if in the latter case the solicitor offers to give an undertaking not to interfere with, damage or remove the contents.

### True Owner's Remedy for Wrong Delivery.

The action against a banker in respect of the wrong delivery or loss of property left with him as bailee is on the ground of negligence or on the ground of *conversion* (see Chapter 15). As is stated in the chapter referred to, it is no defence to a claim for conversion that a person whom it is sought to hold liable acted innocently and in good faith. The banker's duty is to deliver to the customer depositing the goods and to him only, so that he is entitled to take all reasonable steps to ensure that delivery is being properly made.

### The Banker's Lien Over Articles for Safe Custody.

The subject of banker's lien is discussed in Chapter 22, where it is pointed out that a banker has a general lien over all negotiable securities of his customer which come into his hands in the

ordinary course of his business *as a banker*, unless the articles are deposited for a special purpose only or there is an express or implied contract to the contrary.

As a rule, articles deposited for safe custody are properly regarded as being left with the banker for a specific purpose only, and they cannot, therefore, be subject to the banker's general lien. In other words, a banker cannot retain jewellery or negotiable securities deposited with him merely as a warehouseman for his customer in respect of any loan or overdraft due by that customer to the bank. In such circumstances the banker acts in two distinct capacities, and his legal rights and liabilities arising from the two capacities are in no wise related.

If, however, negotiable securities deposited for safe custody have to be dealt with by the banker in the ordinary course of his business *as a banker*, then the lien will arise. But, as has already been pointed out, a bailee cannot in any circumstances obtain a better title to the goods deposited than was possessed by the bailor. If the bailor has no title to the goods, then the bailee cannot exercise any right of lien, and if it can be shown that the articles deposited have been stolen or misappropriated, the banker holding them will be compelled to hand them to the true owner, whether or not the receipt of the defaulting customer is obtained.

The foregoing is the guiding principle, but the decisions based thereon are not consistent, and each case is a question of fact to be determined according to the custom of bankers in the circumstances and the general course of dealings between the banker and the customer concerned. Thus, if bearer bonds with coupons attached are left in the care of a banker and the *customer* periodically cuts off the coupons and hands them to the banker for collection, no lien will arise in respect of the *bonds*, although the banker can exercise a lien over the *coupons* and their proceeds by virtue of the fact that they come into his hands *as a collecting banker*. Moreover, the lien will extend to the bonds as well as to the coupons if the securities are lodged with the banker and he is instructed to cut off and present the coupons as they fall due. Under these conditions the possession of the bonds by the banker is essential if he is to carry out his duty to obtain payment of the coupons: the bonds come into his hands *as a banker*. But the banker will have no lien either on the bonds or on the coupons if the latter are cut off and presented for payment *by the customer* himself. Again, no lien will arise over the bonds in any of the foregoing circumstances, if there is evidence from the terms of a receipt given by the banker that the securities are received by him expressly for safe custody, as, for example, if the receipt specifically acknowledges that the bonds are to be held by the banker "*for safe custody*".

For similar reasons, if securities of debenture or other stock registered in the name of the customer are deposited with the

banker for safe custody, and instructions are given by the customer that dividend and interest warrants are to be forwarded direct to the banker for the credit of his account, the banker's lien will extend to the warrants but not to the certificates, since the former are handled by the banker in the ordinary course of his business, whereas the latter are not. (Cp. *Questions on Banking Practice*, No. 1097.) Again, if bills are deposited by a customer for safe custody until maturity, with instructions that the banker is to present them for collection and payment on the due dates, the banker can enforce a lien against the proceeds, for although in the first instance the bills come into his hands as a bailee, they are subsequently dealt with by him *as a banker*.

### The Presentment of Drawn Bonds and Coupons Lodged for Safe Custody.

In the absence of an express or implied agreement with the customer, there is no obligation on the banker's part to present for payment coupons or bonds left with him for safe custody, although in practice bankers almost invariably undertake this service in respect of all bonds of their customers to which they have access. Of course, if the banker has once accepted the responsibility to make such collections, he will be liable to the customer if any loss ensues by reason of his failure to present coupons for payment at the correct time. If the coupons are payable by advertisement, it devolves upon the banker to ascertain the dates upon which payment will be made (e.g., by searching the *Bondholder's Register*), and to present the coupons for payment at the place specified. In this connection the author recalls a case where a bank had to reimburse a customer who had lost his rights to a bonus issue on shares by reason of the bank's failure to present for payment certain coupons, payable by advertisement, which were attached to bonds held by the bank for safe custody in the customer's name.

The banker's liability to present for collection applies also to bonds, held by him for safe custody, which are periodically drawn for payment, and in order to carry out his obligation in this respect he must take any necessary steps to ascertain whether any bonds in his hands are among those which are from time to time advertised as drawn, e.g., by searching the *Bondholder's Register* previously referred to.

Clearly, however, the bank can incur no liability in respect of the collection of coupons and bonds if it has no access to the bonds, as, for example, where they are deposited by the customer in a locked box of which he keeps the key, or in a sealed envelope.

In actually collecting the proceeds of coupons and bonds the banker must exercise every possible care as the customer's agent for the purpose, and will be liable, as is pointed out in Chapter 15,

for any loss that may arise from his negligence in the discharge of this duty.

**Securities for Safe Custody taken as Security for Advances.**

A banker sometimes finds it expedient to request a customer in whose name securities are held for safe custody to authorise the bank to hold such securities as cover for a loan or overdraft in the customer's name. In such circumstances the securities should be redeposited, i.e., the safe custody receipts should be returned by the customer duly discharged, the entries in the Safe Custody Register should be properly cancelled, the particulars of the items should be transferred to the *Register of Securities*, and the articles should be redeposited by the customer under a Memorandum of Deposit or a Memorandum of Charge, clearly specifying the purpose of the deposit and indicating that it is made in respect of the customer's overdraft.

Similar steps should be taken if articles deposited for safe custody are to be lodged with the bank as security for the obligations of a third person. Unless proper precautions of this nature are taken by the banker, he will be unable to enforce his lien in the event of the customer's bankruptcy, for the securities could be claimed by the trustee as part of the customer's general estate.

## CHAPTER 26

### THE STAMP DUTIES ON BILLS OF EXCHANGE AND OTHER BANKING INSTRUMENTS

STAMP Duties on documents of various kinds form an important and permanent source of revenue both in this and in other countries, the duties being enforced either by the imposition of fines and penalties for the omission to stamp where a stamp is required, or by preventing an unstamped or insufficiently stamped document from being accepted as evidence in a Court of law.

In this country, the general law relating to the stamping of documents for purposes of revenue is contained in the *Stamp Act, 1891*, although a number of provisions of that Act have been amended or extended by subsequent Finance Acts and Revenue Acts, more especially the Finance Acts of 1910, 1918 and 1920, and the Revenue Acts of 1909 and 1911.

#### Nature of Document for purpose of Stamping.

In determining the class into which a document falls for the purposes of stamp duty, regard must be had to its legal effect and intention. The description given to the instrument by the parties thereto is immaterial; for stamp purposes its real and true meaning according to the intention of the parties must be ascertained and the special circumstances of the transaction must be properly construed. Moreover, in dealing with a document for stamping purposes the main and primary object of the instrument must be looked at. Thus a guarantee may contain a promise to pay money, or an assignment may entitle the assignee to the payment of money, but in neither case need the document be stamped as a bill of exchange or promissory note, if it is otherwise properly stamped as a guarantee or assignment, as the case may be.

#### Material Alteration after Stamping.

If a document is materially altered after being stamped, re-stamping may be necessary in order to ensure its validity; as, for example, a bill of exchange or promissory note in which the date is altered after stamping. But this rule will not apply in the case of immaterial alterations which do not alter the legal



effect of the instrument, such as interlineations or alterations made for the purpose of correcting mistakes or omissions as to the description of the parties, provided such alterations are made with the consent of all the parties to the instrument.

By the Stamp Act, 1891, it is provided also that, except where express provision is made to the contrary, the stamp duty on all documents shall be denoted by *impressed* stamps only. The stamp must be affixed and the instrument written in such a way that the stamp cannot be used for any other purpose, while if more than one instrument appears on the same piece of material each instrument must be stamped as if it were a separate document.

### Admission of Unstamped Instruments as Evidence.

Unless an instrument executed in the United Kingdom or relating to property situate in the United Kingdom is properly stamped it cannot be received in a British Court of law as evidence except in criminal proceedings, although if the document is one which may be legally stamped after execution, it may be received in evidence on payment of (a) the unpaid duty; (b) the prescribed penalty for omission to stamp; and (c) a further sum of £1.

### Stamping Documents after Execution.

Only where the Act expressly provides, can documents which are unstamped or insufficiently stamped be stamped after execution. Among those which cannot *usually* be stamped after execution are bills of exchange, bills of lading, contract notes, policies of marine insurance, promissory notes, receipts (after the expiration of one month), and proxies subject to the 1d. duty.

Documents which require *ad valorem* stamps, as, for example, conveyances, mortgages, memoranda of deposit of deeds, and transfers of shares or stock, may be duly stamped with the necessary *ad valorem* duty without penalty before the expiration of 30 days after execution in this country, or, if executed abroad, within 30 days after being first received in the United Kingdom.

Other documents which may be stamped after execution without penalty include (a) agreements under hand only, leases not exceeding one year, and attested copies or extracts, all of which may be stamped within 14 days of execution, and (b) policies of marine insurance executed out of the United Kingdom, which may be stamped within 10 days of receipt in this country.

The following documents cannot be stamped after execution without payment of a penalty: (a) bills of exchange and promissory notes written on material bearing an impressed stamp of sufficient amount but of improper denomination (i.e., intended for another purpose, such as an insurance policy); (b) receipts

which are not stamped within the prescribed period of one month ; (c) letters of allotment and renunciation ; (d) policies of insurance other than marine insurance ; (e) scrip certificates ; (f) share warrants ; (g) warrants for goods, and (h) charter parties. The stamp duties on each of these documents are dealt with below under the appropriate headings.

### General Exemptions from all Stamp Duties.

By virtue of various Acts of Parliament, a number of instruments and documents are specifically exempted from all stamp duty, but so far as the banker is concerned only the following are important :—

(1) Transfers of shares or stock in the Government or Parliamentary stock or funds ;

(2) Any deed, conveyance, assignment, mortgage, or other charge made by a trustee in reference to any property of a bankrupt, and also any power of attorney, order, certificate, instrument or writing issued and relating solely to the property of a bankrupt ;

(3) Any instruments relating to the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or of any interest, share, or property therein ;

(4) Wills and other testamentary instruments or documents ;

(5) Deeds, instruments, or documents issued by or for the purpose of the Post Office.

Other exceptions are specified below under the heading "Agreements under hand". An I.O.U. or any other mere acknowledgment of a debt does not require stamping, so long as there is nothing in the instrument which imports a promise to pay or which can be regarded as a receipt for money. Most documents issued by registered building societies and friendly societies are exempted from stamp duty, provided the documents are issued simply and solely for the purposes of the society.

### Appropriated Stamps.

By Section 10 of the Stamp Act :—

10. (1) A stamp which by any word or words on the face of it is appropriated to any particular description of instrument is not to be used, or, if used, is not to be available, for an instrument of any other description.

(2) An instrument falling under the particular description to which any stamp is so appropriated as aforesaid is not to be deemed duly stamped, unless it is stamped with the stamp so appropriated.

An example of an appropriated stamp within the meaning of this section is the foreign bill stamp, which bears on the face of

it the words "Foreign bill or note", and cannot therefore be effectively used on any other instrument. Again, the impressed "Bill or note" stamp is specifically appropriated to the payment of *ad valorem* duty on inland bills and promissory notes payable at more than three days after date or sight. Other stamps of the same class are National Health Insurance stamps and Unemployment Insurance stamps. Postage stamps are also appropriated, but by virtue of Section 7 of the Stamp Act, which reads as follows, may be used for other purposes :—

7. Any stamp duties of an amount not exceeding two shillings and sixpence upon instruments which are permitted by law to be denoted by adhesive stamps not appropriated by any word or words on the face of them to any particular description of instrument, and any postage duties of the like amount, may be denoted by the same adhesive stamps.

In accordance with these provisions, postage stamps may be used for any purpose for which adhesive stamps are required, unless there are adhesive stamps specifically appropriated for the purpose. \* 4

### Cancellation of Adhesive Stamps.

The law governing the cancellation of adhesive stamps is set forth in Section 8 of the Act, as follows :—

8. (1) An instrument, the duty upon which is required or permitted by law to be denoted by an adhesive stamp, is not to be deemed duly stamped with an adhesive stamp, unless the person required by law to cancel the adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, or otherwise effectively cancels the stamp and renders the same incapable of being used for any other instrument, or for any postal purpose, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time.

(2) Where two or more adhesive stamps are used to denote the stamp duty upon an instrument, each or every stamp is to be cancelled in the manner aforesaid.

(3) Every person who, being required by law to cancel an adhesive stamp, neglects or refuses duly and effectually to do so in the manner aforesaid, shall incur a fine of ten pounds.

An adhesive stamp may be cancelled by any method which renders the stamp incapable of being applied for any other purpose, e.g., a rubber stamp may be impressed across the face, or the stamp may be cancelled in ink or in copying pencil. Presumably, cancellation with an ordinary lead pencil would not be effective for this purpose.

### The Stamping of Bills of Exchange and Promissory Notes.

The definitions of a bill of exchange and promissory note for the purposes of the Stamp Act are much wider than those given in Sections 3 and 83 of the Bills of Exchange Act, 1882, and

bring within their scope many instruments which would not comply with the requisites as to form of a valid bill or note which have been discussed in earlier chapters. The definitions for stamping purposes are thus given in Sections 32 and 33 of the Stamp Act, 1891 :—

32. For the purposes of this Act the expression “bill of exchange” includes draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression “bill of exchange payable on demand” includes—

- (a) An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen; and
- (b) An order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also an order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf.

33. (1) For the purposes of this Act the expression “promissory note” includes any document or writing (except a bank note) containing a promise to pay any sum of money.

(2) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money.

The scale of duties payable in respect of bills of exchange and promissory notes as defined by the foregoing sections is set forth in the First Schedule of the Stamp Act, 1891, since amended by the Finance Act, 1899, and the Finance Act, 1918. By the combined operation of the three Acts, the Schedule reads as follows :—

	£	s.	d.
BILL OF EXCHANGE payable on demand or at sight or on presentation, or not exceeding three days after date or sight, for any amount . . . . .	0	0	2
BILL OF EXCHANGE OF ANY OTHER KIND whatsoever (except a bank note) and PROMISSORY NOTE of any kind whatsoever (except a bank note), drawn or expressed to be payable, or actually paid or indorsed, or in any way negotiated in the United Kingdom :—			
Where the amount or value of the money for which the bill or note is drawn or made does not exceed £10 . . . . .	0	0	2

	£	s.	d.
Exceeds £10 and does not exceed £25 .	0	0	3
"    £25                  "    £50 .	0	0	6
"    £50                  "    £75 .	0	0	9
"    £75                  "    £100 .	0	1	0
"    £100			
For every £100, and also for any fractional part of such amount or value . . .	0	1	0

The twopenny stamp duty in the case of bills and notes on demand or within three days after date or sight is described as "*fixed*", i.e., it does not vary whatever the amount of the instrument, and may be denoted, whether the bill is drawn in this country or abroad, by an impressed stamp, a 2d. postage stamp, or two penny postage stamps. All the other stamp duties payable in accordance with the foregoing schedule, i.e., even including those liable to the twopenny duty, must be denoted by the specially appropriated *ad valorem* stamps. In the case of bills and notes drawn or made within the United Kingdom, the proper "bill or note" stamps must be impressed before issue, while in the case of foreign bills, i.e., bills drawn abroad, the appropriated adhesive "foreign bill or note" stamp must be affixed in accordance with the provisions detailed below. Thus the 2d. impressed stamp on a cheque or bill for £10 on demand differs from the impressed "bill or note" stamp on a bill for £10 payable 30 days after date. In the former case the duty is "*fixed*"; in the latter case it is *ad valorem* and the stamp is appropriated.

Section 10 of the Finance Act, 1899, amended the foregoing duties in respect of bills of exchange *both drawn and expressed to be payable out of the United Kingdom*, which are paid or in any manner negotiated in the United Kingdom. Where the amount of such a bill does not exceed £25 the duty is as in the foregoing schedule, but thereafter:—

(a) Where the amount exceeds £25 and does not exceed £100, the duty is 6d. ;

(b) Where the amount exceeds £100, the duty is 6d. for every £100, and also for any fractional part of £100.

By virtue of this amendment a bill for £75 drawn in Paris payable in Berlin but negotiated on the London Money Market would require a 6d. adhesive foreign bill stamp by reason of its being both drawn and payable out of the United Kingdom, but a bill for £75 drawn in London and payable in Paris would require a 9d. impressed stamp; while a bill drawn in Paris payable in London would require a 9d. adhesive foreign bill stamp in accordance with the schedule given above.

It will be observed that by virtue of the schedule of duties above referred to, a promissory note of any kind whatsoever,

i.e., whether payable on demand or not, requires an *ad valorem* stamp in accordance with the schedule.

### Stamping Bills and Notes drawn in the United Kingdom.

The stamp duty on all inland bills of exchange payable on demand, sight, presentation, or at not exceeding three days after date or sight, may be indicated by a 2d. adhesive postage stamp, or two penny adhesive stamps, or by an impressed 2d. stamp, but if an adhesive stamp is used it must be properly cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody or power (see Section 8 above). With this exception all bills of exchange drawn in the United Kingdom must be drawn on paper impressed with the appropriated "bill or note" *ad valorem* stamp in accordance with the foregoing schedule, and, as already noted, this stamp differs from the impressed stamp which may be used in payment of the "fixed" duty on a cheque or bill on demand.

It follows that an inland cheque is properly stamped if it is drawn on one of the usual impressed stamp forms or if it is drawn on an ordinary piece of paper to which a 2d. postage stamp or two penny postage stamps are affixed. Again, an inland bill of exchange for £1000 payable on demand or at not more than three days after date or sight may be stamped with an impressed or adhesive 2d. stamp, but an inland bill of exchange for £10 payable 30 days after date must be drawn on paper bearing a 2d. impressed *bill or note stamp*.

With the one exception provided for as follows in Section 37 of the Stamp Act, no bill of exchange or promissory note subject to an impressed stamp can be stamped after execution:—

37. (1) Where a bill of exchange or promissory note has been written on material bearing an impressed stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty, and a penalty of forty shillings if the bill or note be not then payable according to its tenor, or of ten pounds if the same be so payable.

(2) Except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof.

An order sent by a customer to a banker instructing the latter to make a payment at a certain fixed future date does not require stamping as a bill of exchange after date; a 2d. impressed or adhesive stamp is correct, for by virtue of Section 32 of the Stamp Act, already quoted, the expression "bill on demand" includes an order for the payment of a sum of money at any time after the date thereof, provided the order is sent to the person *by whom* the payment is to be made and not to the person *to whom* the payment is to be made or any person on his behalf. Furthermore, by virtue of the same section, a bill of exchange payable on demand includes an order instructing a person to make payment of a sum of money weekly, monthly or at any

other stated periods, and thus applies to a "standing order", by which a customer instructs a banker to pay subscriptions, insurance premiums or other periodical payments on his behalf.

### Bills and Notes Drawn Abroad.

For purposes of the Stamp Act, 1891, the respective definitions of inland and foreign bills as given in the Bills of Exchange Act, 1882, do not apply, but a bill or note which is to be regarded as "foreign" for the purposes of determining the type of stamp which it should bear is thus defined by Section 36 of the Stamp Act :—

36. A bill of exchange or promissory note which purports to be drawn or made out of the United Kingdom is, for the purpose of determining the mode in which the stamp duty thereon is to be denoted, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom.

In accordance with this section any bill or note which *purports to be drawn outside the United Kingdom* is, for stamping purposes, to be regarded as a foreign instrument, and as such it must be stamped with an *adhesive* foreign bill stamp, except in the case of a foreign bill of exchange payable on demand or at not exceeding three days after date or sight, in which case an impressed stamp or an adhesive postage stamp, or an adhesive foreign bill stamp may be affixed. With this exception impressed stamps must not be used for bills of exchange drawn outside the United Kingdom. Moreover, it should be observed that the exception here referred to does not apply to promissory notes drawn abroad, which must in all cases bear adhesive foreign bill or note stamps, whether they are payable on demand or not.

The fact that a bill or note is adequately stamped in accordance with the law of the country of issue does not affect its liability to stamp duty under British Law, while our courts are not concerned with the fact that a foreign bill is not properly stamped in accordance with the law of the country of issue. Nevertheless, a holder who wishes to maintain a right of action on the bill against parties resident in another country, should, for his own protection, ensure that the proper stamp duty is affixed according to the relative foreign stamp laws.

For purposes of stamp duty an inland bill is one drawn within the *United Kingdom*, whereas Section 4 of the Bills of Exchange Act defines an inland bill as one drawn and payable within the *British Islands* or drawn in the *British Islands* upon a person resident therein. Thus the Channel Islands and the Isle of Man, which do not form part of the United Kingdom, must be regarded as foreign countries for purposes of stamp duty, although for purposes of the Bills of Exchange Act they form part of the British Isles. Thus, a bill drawn in Jersey or in the Isle of Man and made payable in London is an inland bill for the purposes

of the Bills of Exchange Act, but must be treated as a foreign bill for purposes of stamp duty. Such a bill cannot be stamped with an impressed stamp unless it is payable on demand, or at not more than three days after date or sight, but if it is dishonoured it need not be protested as a foreign bill, noting alone being sufficient as in the case of any other inland bill.

Although Southern Ireland has now been established as the independent Irish Free State, no alteration in the stamp laws has yet been effected in order to cover the change. The present position is not altogether clear, but apparently the Irish Free State is not to be regarded as a foreign country for purposes of stamp duty. By virtue of a circular issued by the Commissioners of Inland Revenue and dated May, 1923 :—

“ An instrument chargeable with stamp duties in both countries and stamped in either country will, to the extent of the duty it bears, be deemed to be stamped in the other country. So long, therefore, as the same rates of stamp duties obtain in Great Britain and the Irish Free State, such an instrument, duly stamped in the one country, will not require to be stamped in the other ”.

It should be noted, however, that the bill must be stamped in the country of origin. Thus, a bill drawn in London on a person resident in Dublin, and payable in Dublin, is not properly stamped with an Irish impressed stamp: an impressed British stamp is required.

### Duty of Holder to Stamp a Foreign Bill.

The duty of a holder of a foreign bill or note in regard to stamping the instrument is thus defined by Section 35 of the Stamp Act, 1891 :—

35. (1) Every person into whose hands any bill of exchange or promissory note drawn or made out of the United Kingdom, comes in the United Kingdom before it is stamped shall, before he presents for payment, or indorses, transfers, or in any manner negotiates, or pays the bill or note, affix thereto a proper adhesive stamp or proper adhesive stamps of sufficient amount, and cancel every stamp so affixed thereto.

(2) Provided as follows :—

(a) If at the time when any such bill or note comes into the hands of any bona fide holder there is affixed thereto an adhesive stamp effectually cancelled, the stamp shall, so far as relates to the holder, be deemed to be duly cancelled, although it may not appear to have been affixed or cancelled by the proper person ;

(b) If at the time when any such bill or note comes into the hands of any bona fide holder there is affixed thereto an adhesive stamp not duly cancelled, it shall be competent for the holder to cancel the stamp as if he were the person by whom it was affixed, and upon his so doing the bill or note shall be deemed duly stamped, and as valid and available as if the stamp had been cancelled by the person by whom it was affixed.

(3) But neither of the foregoing provisos is to relieve any person from any fine or penalty incurred by him for not cancelling an adhesive stamp.



It will be noted that this section applies only when a bill is presented for payment, indorsed, transferred or negotiated, so that a foreign drawn bill may be presented for acceptance in this country without becoming liable to British stamp duty. On the other hand, the bill will require stamping with the relative foreign bill stamp if the drawee pays it at once instead of accepting. Moreover, if a foreign bill is both drawn and payable abroad, and without being negotiated in this country, is indorsed by the payee or a holder and is sent here to be held during its currency as security for a loan, then it must be stamped in accordance with British law.

If the stamp on a foreign bill is not properly affixed and cancelled by the drawer or by the first person into whose hands it comes in this country, any subsequent holder is authorised to affix the requisite stamp, but if such a bill is presented for payment without the necessary stamp, the holder's power of stamping is lost, and the person presenting and any persons who have negotiated or otherwise dealt with the instrument are liable to a fine in accordance with Section 37 above referred to.

Finally, it must be observed that the 2d. impressed or adhesive postage stamp may be used on foreign bills only when the bill is payable on demand, or at not more than three days after date or sight, i.e., when it is subject to the *fixed* duty of 2d. whatever its value. In all other cases, the 2d. adhesive foreign *bill stamp* must be used. Thus, a foreign drawn bill for £1000 payable on demand may be stamped with an impressed stamp or a 2d. postage stamp or a 2d. foreign bill stamp, but a foreign drawn bill for £10 payable 30 days after date or sight must be stamped with an adhesive foreign bill stamp. The duty in the latter case is *ad valorem* and not fixed, and must, accordingly, be denoted by the stamp specially appropriated to that class of document, i.e., the adhesive foreign bill stamp.

### Penalty for Issuing Unstamped Bills and Notes.

The penalty for issuing or dealing with a bill or cheque which is not properly stamped in accordance with the foregoing provisions is thus set forth by Section 38 of the Stamp Act, 1891:—

38. (1) Every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped shall incur a fine of ten pounds, and the person who takes or receives from any other person any such bill or note either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever.

(2) Provided that if any bill of exchange payable on demand or at sight or on presentation (or at a period not exceeding three days after date or sight—Revenue Act, 1909) is presented for payment unstamped, the person to whom it is presented may affix thereto an adhesive stamp of twopenny, and cancel the same, as if he had been the drawer of the bill, and may thereupon pay the sum in the bill mentioned, and charge the duty

in account against the person by whom the bill was drawn, or deduct the duty from the said sum, and the bill is, so far as respects the duty, to be deemed valid and available.

(3) But the foregoing proviso is not to relieve any person from any fine or penalty incurred by him in relation to such bill.

By virtue of Sub-section 38 (2), it will be observed that, apart from the drawer of an inland cheque or bill of exchange on demand, the drawee or banker to whom it is presented for payment is the only person who is authorised to affix and cancel an adhesive stamp, if such a stamp has not been previously affixed. But even if such an instrument is so stamped by the drawee or paying-banker, such stamping does not relieve the defaulting party from the penalty of £10 to which he is subject by reason of having omitted to stamp the instrument. The foregoing provision by which a drawee may affix and cancel the 2d. adhesive stamp on a bill payable on demand, sight or presentation, is extended to bills at not exceeding three days after date or sight by the Revenue Act, 1909. But this extension does not apply to promissory notes.

It must be noted also that the exception referred to in Sub-section 38 (2) applies to *foreign* bills on demand or at sight, or at not exceeding three days after date or sight, just as much as to inland bills of the same kind. Thus, such a bill is not properly stamped unless it is stamped either by the first holder in this country or the drawee or banker to whom it is presented for payment.

But although any holder of a bill or note which requires an adhesive stamp will render himself liable to a penalty if it can be shown that the instrument was not properly stamped when it passed through his hands, a *bona fide* holder is not forced to inquire whether a properly cancelled adhesive stamp has, in fact, been affixed by the right person, while such a holder may at any time cancel an uncanceled stamp on a foreign bill which has come into his hands. In this respect the rights of a *bona fide* holder of a foreign bill differ from those of a *bona fide* holder of an inland bill, for, as has been pointed out, an inland bill cannot be stamped by a holder after execution unless it falls within the exception specified in Section 37.

### Documents Exempt from Stamp Duty as Bills of Exchange or Promissory Notes.

By virtue of the First Schedule of the Stamp Act, the following instruments are exempt from the stamp duties discussed in the foregoing paragraphs :—

- (1) Bill or note issued by the Bank of England or the Bank of Ireland.
- (2) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.

(3) Letter written by a banker in the United Kingdom to any other banker in the United Kingdom, directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made or to any person on his behalf.

(4) Letter of credit granted in the United Kingdom, authorising drafts to be drawn out of the United Kingdom payable in the United Kingdom.

(5) Draft or order drawn by the Paymaster-General on behalf of the Court of Chancery in England or by the Accountant-General of the Supreme Court of Judicature in Ireland.

(6) Warrant or order for the payment of any annuity granted by the National Debt Commissioners, or for the payment of any dividend or interest on any share in the Government or Parliamentary stocks or funds.

(7) Bill drawn by any person under the authority of the Admiralty, upon and payable by the Accountant-General of the Navy.

(8) Bill drawn (according to a form prescribed by Her Majesty's orders by any person duly authorised to draw the same) upon and payable out of any public account for any pay or allowance of the army or auxiliary forces or for any other expenditure connected therewith.

(9) Draft or order drawn upon any banker in the United Kingdom by an officer of a public department of the State for the payment of money out of a public account.

(10) Bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue.

(11) Coupon or warrant for interest attached to and issued with any security, or with an agreement or memorandum for the renewal or extension of time for payment of a security.

Exemption 2 refers to the documents known as "Bankers' Payments", issued for the purpose of settling clearing differences, or making special payments between bankers who do not conduct agency accounts with each other. To come within the exemption, however, it is essential that *both* parties to the document shall be bankers.

Exemption 3 covers letters addressed by one bank to another directing a payment or transfer of money to, or to the account of, a third person, or a direction sent by one banker to another directing the latter to transfer money to the account of the former at a third bank. In this case it is essential that the letter or instruction shall pass between the two bankers first mentioned.

Letters of credit which do not fall within the exact scope of Exemption 4 must be stamped with an *ad valorem* stamp on the amount which the grantee is authorised to draw. Thus an impressed *ad valorem* stamp must be borne by a letter of credit drawn in the United Kingdom, authorising drafts to be drawn *within* the United Kingdom, whether payable here or abroad.

By virtue of Exemption 9, all cheques issued by Government departments are exempt, but cheques issued by local authorities, *other than poor law guardians*, require to be stamped. By virtue of Section 33 of the Friendly Societies Act, 1896, cheques issued by a registered friendly society or building society incorporated under the Friendly Societies Acts, are exempt from stamp duty, but the cheques of unincorporated building societies and other

societies require to be stamped. Cheques issued by a trustee in bankruptcy are also exempt, by virtue of the general exemptions referred to on page 686.

By the Post Office Act, 1890, cheques of postmasters are exempt from stamp duty if executed for the purpose of making payments for the purpose of the Post Office, from one department to another.

Section 40 of the Finance Act, 1894, also exempts from stamp duty a coupon for interest on a marketable security, being one of a set of coupons whether issued with the security or subsequently issued in a sheet.

The exemption referred to in Exemption 11 above does not apply to a coupon attached to a scrip certificate.

An I.O.U. does not require a stamp.

As is pointed out on page 157, *ante*, local authorities and other bodies sometimes discharge their obligations by instructing their treasurer or banker to make payments in accordance with a duly authenticated list of creditors and amounts which is supplied by the officials of the authority, who at the same time advise the creditors of the authority that payment of their claims will be made by the banker or treasurer upon demand. In such cases, the instructions issued to the treasurer or banker require a two-penny stamp in respect of each creditor on the list (or in respect of each amount on the list which must be paid separately), while a similar stamp must be affixed to each intimation to a creditor.

### The Stamp Duty on Bills Payable with Interest.

The stamp duty on a bill of exchange or promissory note payable with interest is chargeable only on the principal sum for which the bill is drawn *unless* the actual amount of interest is clearly indicated on the face of the instrument, in which case the stamp must cover the interest as well as the principal sum. Thus a foreign drawn bill for £1200 with interest at 5 per cent. per annum requires an adhesive foreign bill stamp for 12s. only, whereas if the instrument is drawn for payment of "£1200 with the addition of £60 as interest", an adhesive foreign bill stamp for 13s. will be required and must be affixed by the drawer or first person negotiating or transferring the bill in this country.

### Stamp Duty on Bills Drawn in a Set.

By virtue of Section 39 of the Stamp Act, 1891 :—

39. When a bill of exchange is drawn in a set according to the custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated apart from the stamped bill, be exempt from duty; and upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from the lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of the lost or destroyed bill.

It is to be noted that the law only recognises an unstamped part for this purpose if it has not been issued or in any manner negotiated, but if such a part has been so issued, negotiated or transferred as a separate instrument it must be properly stamped, otherwise any parties to the issue, negotiation or transfer will render themselves liable to the usual penalties. Moreover, the section relates to the admission as evidence of a *part of a set*, which must be distinguished from a *copy* of a bill. A copy of a bill is recognised in this country for two purposes only: (1) as evidence of indorsement and of the liability of an indorser on a bill issued and negotiated in a foreign country where copies are legal; and (2) for purposes of protest when the original bill is lost. In this connection, Moxon<sup>1</sup> suggests that an originally unstamped inland bill of exchange may be legalised by attaching thereto a copy which is subsequently drawn on properly stamped paper. Such a practice is, however, undoubtedly illegal, for it amounts to stamping a bill with an impressed stamp after execution, and anyone issuing, negotiating or paying such an instrument is liable to a penalty, while no transferee or holder can sue upon it.

Difficulties sometimes arise, however, if an unstamped blank acceptance is sent from abroad for the signature of the drawer. If it is possible (i.e., if the form of the bill permits), the blank acceptance should be attached to a second part and the two parts negotiated together as a bill in a set. If this cannot be done, apparently the only alternative is to make application to Somerset House to have the instrument stamped with an impressed stamp, for adhesive stamps cannot be used for a bill which on the face of it is an inland instrument.

### Stamping Bills and Notes after Execution.

There are only *three* cases in which a *bill of exchange or cheque* can be legally stamped after execution and two cases in which a *promissory note* can be so stamped:—

1. *Bills of exchange* of any kind subject to the 2d. stamp duty, i.e., those payable on demand, or payable at not more than three days after date or sight, in which case the stamp may be affixed by the person to whom the bill is presented for payment, but by no other. Moreover, the power of the drawee to stamp such a bill cannot be exercised unless he is prepared to pay. Thus a banker cannot affix a stamp to an unstamped cheque if he does not propose to pay the instrument. This exemption does not apply to promissory notes.

2. *Bills of exchange or promissory notes* drawn or made out of the United Kingdom, and therefore subject to be stamped with adhesive stamps, which must be affixed by

<sup>1</sup> *English Practical Banking*, page 30.

the first holder into whose hands the bill comes in this country.

3. *Bills of exchange or promissory notes*, sufficiently stamped as to amount, but written on paper meant for a different sort of instrument, as, for example, on an insurance policy or protest form. In such a case the requisite stamp may be affixed in accordance with the provisions of Section 37.

Although a post-dated cheque is in effect a bill payable after date, it is not invalid as a cheque either under the Bills of Exchange Act or the Stamp Act, and is therefore correctly stamped with a 2d. impressed or adhesive stamp. (See Chapter 12.)

### Bills Drawn in Foreign Currency.

Section 6 of the Stamp Act, 1891, provides as follows for the method of calculating *ad valorem* stamp duty on bills of exchange and promissory notes drawn in a foreign currency:—

6. (1) Where an instrument is chargeable with *ad valorem* duty in respect of—

(a) any money in any foreign or colonial currency, or

(b) any stock or marketable security,

the duty shall be calculated on the value, on the day of the date of the instrument, of the money in British currency according to the current rate of exchange, or of the stock or security according to the average price thereof.

(2) Where an instrument contains a statement of current rate of exchange, or average price, as the case may require, and is stamped in accordance with that statement, it is, so far as regards the subject matter of the statement, to be deemed duly stamped, unless or until it is shown that the statement is untrue, and that the instrument is in fact insufficiently stamped.

In times of frequently fluctuating exchanges it is not always easy to determine, on the day the instrument falls due for payment, what was the current rate ruling on the date of the bill; nevertheless, the Inland Revenue will not countenance the practice which is sometimes adopted of taking for *stamping* purposes the rate of exchange on the date of maturity. On the other hand, the rate of exchange for sight drafts on the date of maturity must be taken for purposes of *payment*.

If a foreign bill is drawn abroad in sterling, and is negotiated in this country at such a rate of exchange that the amount payable differs from that for which the bill was drawn, the stamp is to be calculated on the face value of the instrument.

### Stamps on Receipts.

A receipt is generally defined as a written document, signed by the person giving it, acknowledging the receipt of a sum of money from another person whose name is specified. The

definition given by the Stamp Act is somewhat wider than this, for by Section 101 of that Act it is provided :—

101. (1) For the purposes of this Act the expression "receipt" includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person.

(2) The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

By the Stamp Act, 1891, receipts subject to stamp duty are those given for, or upon payment of, money amounting to £2 or upwards. The stamp may be either impressed or adhesive. The adhesive stamps used are postage stamps, which must be properly cancelled by the person giving the receipt before he delivers it out of his hands. No other person is legally permitted to affix and cancel a receipt stamp, except under the conditions set forth in Section 102 of the Act, as follows :—

102. A receipt given without being stamped may be stamped with an impressed stamp upon the terms following; that is to say,

(1) Within fourteen days after it has been given, on payment of the duty and a penalty of five pounds;

(2) After fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of ten pounds;

and shall not in any other case be stamped with an impressed stamp.

Section 103 of the Stamp Act provides for the imposition of penalties if a receipt stamp as required by the Act is not properly affixed :—

103. If any person—

(1) Gives a receipt liable to duty and not duly stamped; or

(2) In any case where a receipt would be liable to duty refuses to give a receipt duly stamped; or

(3) Upon a payment to the amount of two pounds or upwards gives a receipt for a sum not amounting to two pounds, or separates or divides the amount paid with intent to evade the duty;

he shall incur a fine of ten pounds.

### Documents Exempt from Receipt Stamp Duty.

The First Schedule of the Stamp Act, 1891, as amended or extended by the Acts referred to below, provides that the following documents shall be exempt from stamp duty :—

(1) Receipt given for money deposited in any bank, or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for.

By virtue of this provision, a deposit receipt issued by a banker to a customer is exempt from stamp duty, but when it is

discharged, the receipt indorsed on the back of the instrument must be stamped by the customer if the amount is £2 or over. For this reason, the deposit receipts issued by some banks are stamped with a 2d. receipt stamp before issue in order to save the trouble of affixing an adhesive receipt stamp on payment of the money. But the acknowledgment on the back of a deposit receipt does not require stamping if its form is altered to indicate that the amount of the deposit is being transferred to a current or deposit account.

The exemption also extends to a letter sent by a banker to his customer acknowledging the receipt of money (including cheques, bills, etc.) for the credit of that customer's account. But an acknowledgment or receipt sent by a banker to a *third party*, in respect of money paid in by that party to a customer's account, is not exempt from duty, as it is not sent to the person to whom the banker is accountable for the money. A receipt in respect of money transferred from one account to another will not require stamping, provided that it is given to the person to whose account the money is transferred, but a receipt will be required if it is given to a person transferring funds to the account of another.

Again, a receipt given by one bank for money received by it for transfer to another bank will not be exempt, for the bank receiving the money has not to account for it to the person for whose account it is received. The difficulty in such a case may, however, be overcome if the banker receiving the money acknowledges it as an agent for the other bank, as, for example, by stating on the receipt "Received by the Northern Bank, Limited (by its agent the Southern Bank, Ltd.), the sum of . . .", etc.

(2) Acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment.

This exemption covers the receipt by a banker of cheques, bills of exchange, promissory notes, dividend warrants and conditional orders for payment, all of which are included in the definitions quoted on page 688.

(3) Receipt given for or upon the payment of any parliamentary taxes or duties, or of money to or for the use of Her Majesty.

This exempts from the stamp duty receipts given by collectors of taxes, collectors of customs and excise, and receipts given by Government departments in respect of public money.

(4) Receipt given by an officer of a public department of the State for money paid by way of imprest or advance, or in adjustment of an account, where he derives no personal benefit therefrom.

(5) Receipt given by any agent for money imprested to him on account of the pay of the army.

(6) Receipt given by any officer, seaman, marine or soldier, or his representatives, for or on account of any wages, pay or pension, due from the Admiralty or Army Pay Office.



(7) Receipt given for any principal money or interest due on an exchequer bill.

(8) [Receipt written upon a bill of exchange or promissory note duly stamped, or upon a bill drawn by any person under the authority of the Admiralty, upon and payable by the Accountant-General of the Navy.]

Exemption 8 has been repealed by Section 9 of the Finance Act, 1895, by which Act it is provided that the receipt written upon a bill of exchange or promissory note must be duly stamped, whether it appears on the face or back of the instrument. The name of a banker (whether accompanied by words of receipt or not) written in the ordinary course of his business as a banker upon a bill of exchange or promissory note duly stamped, or the name of a payee written upon a draft or order, does not constitute a receipt chargeable with stamp duty. Thus, if the payee of a cheque presents it for payment and signs his name on the back in acknowledgment of the money, his signature strictly constitutes a receipt and not an indorsement, but it will not be chargeable with stamp duty as a receipt, unless, of course, words of receipt are added to the signature.

This exemption would also extend to the case when a banker indorses a cheque or bill of exchange "Received for the credit of payee's account with us" or "Placed to the credit of payee's account with us", and presumably also the placing of a crossing stamp on the back of a bill of exchange forwarded for collection is exempt from duty although it is evidence that a banker receives, or wishes to receive, the proceeds.

(9) Receipt given upon any bill or note of the Bank of England or the Bank of Ireland.

(10) Receipt given for the consideration money for the purchase of any share in any of the Government or Parliamentary stocks or funds, or in the stocks and funds of the Secretary of State in Council of India, or of the Bank of England, or of the Bank of Ireland, or for any dividend paid on any share of the said stocks or funds respectively.

(11) Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty, and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned.

The latter exemption does not apply to bills of exchange and promissory notes (receipts on which are now specifically covered by Section 9 of the Finance Act, 1895, already referred to) but relates to documents such as conveyances, settlements, assignments, etc., also to letters of allotment and to instalment receipts attached to scrip certificates.

By Section 115 of the Law of Property Act, 1925, however, receipts for mortgage monies indorsed on a mortgage are liable to 6d. per cent. *ad valorem* duty, see page 704.

Section 33 of the Friendly Societies Act, 1896, exempts from stamp duty a receipt given by a registered friendly society in respect of any money received by it according to its rules, or for its purposes. Apparently also, the Inland Revenue Com-

missioners will not enforce the usual penalty for omission to affix a receipt stamp in the case of a receipt for a donation or subscription to an institution entirely devoted to charitable purposes.

Section 36 of the Finance Act, 1924, exempts from stamp duty receipts given for or on account of any salary, pay or wages, or for or on account of any other like payment made to or for the account or benefit of any person, being the holder of an office or an employee, in respect of his office or employment, or for or on account of money paid in respect of any pension, superannuation allowance, compassionate allowance or other like allowances.

### The Stamp Duty on Agreements under Hand.

By virtue of the Stamp Act, 1891, a 6d. adhesive stamp must be fixed and cancelled in respect of "any agreement or any memorandum of an agreement, made in England or Ireland *under hand* only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument. The stamp must be cancelled by the person by whom the agreement is first executed". It must be observed that these provisions specifically exclude agreements under seal, such as mortgages, conveyances, etc., and also that they do not apply to agreements or contracts such as bills of exchange, transfers of shares, etc., the stamps on which are otherwise provided for by the Act.

By virtue of Section 23, any instrument under hand given upon a deposit as security for a loan of any share warrant, stock certificate to bearer or other instrument transferable by delivery, shall be stamped as an agreement with a 6d. stamp. A banker's Memorandum of Deposit or Memorandum of Charge would come within these provisions. By the same section an instrument under hand only taken in connection with the deposit as security, of a duly stamped transfer of registered stock or other marketable security (e.g., a Banker's Memorandum of Transfer), shall also be stamped with a 6d. agreement stamp. A guarantee under hand is also covered by these provisions and subject to the 6d. duty.

The correct adhesive stamp to be used in the foregoing case is the 6d. postage stamp, but if the instrument is not so stamped at the time of its execution, it may be stamped with an impressed stamp within 14 days from its date, but not after.

### Agreements Exempt from Stamp Duty.

The following agreements are exempt from stamp duty :—

- (1) Agreement or memorandum the matter whereof is not of the value of £5.

(2) Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant.

(3) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise.

(4) Agreement or memorandum made between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom.

(5) Agreement entered into between a landlord and tenant pursuant to sub-section six of section eight or sub-section two of section twenty of the Land Law (Ireland) Act, 1881.

### Stamp Duties on Mortgages, Bonds, Debentures, etc.

The term "mortgage" for the purpose of the Stamp Act, means a mortgage by way of security for the payment of any definite and certain sum of money lent or to be lent.

By the first Schedule of the Act any such mortgage, bond, debenture or covenant (except marketable securities and securities payable to bearer otherwise specially charged with duty) must be stamped as follows :—

(1) Being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money—		£	s.	d.
Not exceeding £10		0	0	3
Exceeding £10 and not exceeding £25		0	0	8
" £25	" £50	0	1	3
" £50	" £100	0	2	6
" £100	" £150	0	3	9
" £150	" £200	0	5	0
" £200	" £250	0	6	3
" £250	" £300	0	7	6
" £300				
For every £100, and also for any fractional part of £100, of the amount secured . . . . .		0	2	6
(2) Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped :—				
For every £100, and also for any fractional part of £100, of the amount secured . . . . .		0	0	6
[As regards Sub-section 2, however, the <i>Revenue Act, 1903</i> , provides that the duty in such a case shall not exceed 10s.]				
(3) Being an <i>Equitable Mortgage</i> :—				
For every £100, and any fractional part of £100, of the amount secured . . . . .		0	1	0
[An "equitable mortgage" means an agreement or memorandum, under hand only, relating to the deposit of any title deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security), or creating a charge on such property.]				
(4) TRANSFER, ASSIGNMENT, DISPOSITION, OR ASSIGNATION of any such mortgage, etc. :—				
For every £100, and also for any fractional part of £100, of the amount transferred, assigned, or disposed, exclusive of interest which is not in arrear . . . . .		0	0	6

And also where any further money is added to the money already secured . . . . .

{ The same duty as a principal security for such further money.

(5) RECONVEYANCE, RELEASE, DISCHARGE, SURRENDER, RESURRENDER, WARRANT TO VACATE, OR RENUNCIATION OF any such security :—

For every £100, and also for any fractional part of £100, of the total amount or value of the money at any time secured	£ s. d. 0 0 6
---	------------------

By Section 115 of the *Law of Property Act, 1925*, the receipt for monies secured by mortgage indorsed on, or attached to the mortgage instrument, which serves as a reconveyance to the mortgagor must be stamped as if it were a reconveyance under seal, with 6d. per cent. *ad valorem* duty.

### Mortgage to Secure a Current Account.

By virtue of Section 88 of the Stamp Act, the stamp on a mortgage to secure a current account must be calculated on the amount of the *limit* to the advance, if such a limit is fixed, but if there is no such limit, the security will be available only to the amount which the *ad valorem* stamp duty on the mortgage will cover, provided that if the limit is exceeded, the mortgage may be properly stamped to cover the excess as if it were a new and separate instrument. To be valid the stamping must be effected within the legal period of 30 days from the date of the excess advance.

### Stamp Duties on Policies of Marine Insurance.

A policy of marine insurance insures a ship or the goods thereon either for a certain voyage (i.e., a "voyage" policy) or during a specified period of time (i.e., a "time" policy), or both. Such policies cannot be enforced unless they are properly stamped, and they cannot be stamped after execution except on payment of a penalty of £100, unless the policy is one which has been made abroad, in which case it may be stamped with the correct duty within ten days of its arrival in this country.

By the Stamp Act, 1891, as amended by the Finance Acts, 1908 and 1920, the stamp duty on such policies is one penny in all cases where the premium does not exceed 2s. 6d. per cent. of the sum insured.

In other cases the duties are :—

- |   |         |
|---|---------|
| (1) On any <i>voyage</i> policy—  | £ s. d. |
| For every £250 or fraction of £250 up to £1000  | 0 0 3   |
| Thereafter for each additional £500 or fraction of £500   | 0 0 6   |
| (2) On any <i>time</i> policy—  |         |
| Not exceeding six months, <i>three</i> times the stamp duty payable on a voyage policy.                           |         |
| Exceeding six months but not exceeding twelve months, <i>six</i> times the stamp duty payable on a voyage policy. |         |

**The Stamp Duty on a Lease.**

Leases for any indefinite term or for any definite term exceeding one year are subject to stamp duty as follows :—

(a) If the consideration for the lease or any part of the consideration consists of money in a lump sum, stock or security, the same duty as on a conveyance on a sale for the same consideration—*see* Conveyances or Transfers.

(b) If the consideration or any part thereof is paid in the form of rent :—

In respect of such consideration if the rent, whether reserved as a yearly rent or otherwise, is at a rate or average rate :—

	If the term does not exceed 35 years, or is indefinite.	If the term exceeds 35 years, but does not exceed 100 years.	If the term exceeds 100 years.
	£ s. d.	£ s. d.	£ s. d.
Not exceeding £5 per annum . . . . .	0 1 0	0 6 0	0 12 0
Exceeding—			
£5 and not exceeding £10 . . . . .	0 2 0	0 12 0	1 4 0
£10 " " £15 . . . . .	0 3 0	0 18 0	1 16 0
£15 " " £20 . . . . .	0 4 0	1 4 0	2 8 0
£20 " " £25 . . . . .	0 5 0	1 10 0	3 0 0
£25 " " £50 . . . . .	0 10 0	3 0 0	6 0 0
£50 " " £75 . . . . .	0 15 0	4 10 0	9 0 0
£75 " " £100 . . . . .	4 0 0	6 0 0	12 0 0
£100			
For every full sum of £50, and also for any fractional part of £50, thereof . . . . .	0 10 0	3 0 0	6 0 0

An agreement for the letting of lands, etc., for a term not exceeding 35 years or for an indefinite period is subject to duty as if it were a lease, but where a lease is subsequently executed in conformity with such a duly stamped agreement only a 6d. duty is payable upon the lease, unless a further option given by the agreement is exercised or the terms of the original agreement are varied, when the lease will be subject to *ad valorem* duty as detailed above.

**Stamp Duties on other Instruments of Importance to the Banker.**

**AN AGREEMENT UNDER SEAL**, not otherwise specifically charged with stamp duty, requires a 10s. impressed stamp.

**ARTICLES OF ASSOCIATION** of a joint-stock company require a 10s. deed stamp, which must be impressed, and on registration must be accompanied by a 5s. fee stamp.

**ARTICLES OF PARTNERSHIP** require a 6d. adhesive or impressed stamp if under hand, or a 10s. deed stamp if under seal. (See "Agreement" and "Deed" respectively.)

**AN ABSOLUTE ASSIGNMENT** of a debt, etc., requires stamping

at the same rate as a Conveyance or Transfer on Sale. (See below.)

**BANK NOTES** for money payable on demand (other than Bank of England Notes) require stamping as follows :—

		£	s.	d.
If the amount does not exceed	£1	.	.	0 0 5
"	£2	.	.	0 0 10
"	£5	.	.	0 1 3
"	£10	.	.	0 1 9
"	£20	.	.	0 2 0
"	£30	.	.	0 3 0
"	£50	.	.	0 5 0
"	£100	.	.	0 8 6

The penalty for issuing unstamped bank notes is £50, and for receiving or transferring such notes, £20. As a rule, the stamp duty on bank notes is compounded, i.e., the issuing bank arranges to pay a fixed annual sum to the Inland Revenue instead of stamping its notes. Thus, the Bank of England pays £60,000 a year in respect of its notes. Bank notes may be reissued without being liable to any further stamp duty, but the notes of the Bank of England are not usually so issued when once they are returned to that institution.

A **BILL OF LADING** or order for any goods to be exported or carried coastwise requires a 6d. impressed stamp which must be affixed before execution. Any person who executes a bill of lading not duly stamped will incur a fine of fifty pounds.

A **BILL OF SALE** requires stamping as a mortgage if it is given by way of security, but if it is *absolute*, it must be stamped as a conveyance. (See below.)

A **CHARTER PARTY** requires a 6d. adhesive stamp, which must be cancelled by the person last executing the instrument, unless it was executed out of the United Kingdom, in which case it must be stamped by the person receiving it in this country within ten days after it has arrived from abroad. A charter party may be stamped with an impressed stamp within one month of its execution on payment of a penalty, but not otherwise.

A **CONTRACT NOTE** for or relating to the sale or purchase of any stock or marketable security must be stamped as follows :—

Where the value of the stock or security :—		£	s.	d.
Exceeds	£5 but does not exceed	£100	.	0 0 6
"	£100	£500	.	0 1 0
"	£500	£1000	.	0 2 0
"	£1000	£1500	.	0 3 0
"	£1500	£2500	.	0 4 0

For every additional £2500 or part thereof an additional 2s. is payable, subject to a maximum duty of £1.

A contract note relating to security of less value than £5 does not require stamping. The note must be stamped by the broker by whom it is executed, and unless it is so stamped the person defaulting will be liable to a fine of £20, and will have no

legal claim to the brokerage or commission due to him in respect of the transaction.

**CONVEYANCES AND TRANSFERS ON SALE.** The term "conveyance" is usually understood to mean the deed by which freehold property is conveyed to a purchaser, but legally it includes also any deed assigning, mortgaging, leasing or surrendering any property. The word property for this purpose includes personal property, such as shares and stock, and real property, such as land and houses. A conveyance or transfer by way of security requires stamping as a mortgage (see page 703), but on a sale or otherwise it must be stamped in accordance with the following schedules :—

**CONVEYANCES OR TRANSFERS, on Sale or Otherwise.**

	£	s.	d.
1. Of any stock of the Bank of England . . . . .	0	15	6
2. Of any Canadian or Colonial Government Stock. For every £100 (or part thereof) of the nominal value of the stock . . . . .	0	5	0
3. Of any property ( <i>except such stock as aforesaid</i> ), Where the amount or value of the consideration for the sale does not exceed £5 . . . . .	0	1	0
Exceeds £5, and does not exceed £10 . . . . .	0	2	0
" £10, " £15 . . . . .	0	3	0
" £15, " £20 . . . . .	0	4	0
" £20, " £25 . . . . .	0	5	0
" £25, " £300, For every £25, or fractional part thereof, up to £300 . . . . .	0	5	0
" £300, For every £50, and also for any fractional part of £50, of such amount or value . . . . .	0	10	0

A **DEBENTURE** requires stamping as a mortgage, or as a marketable security (see below), according to the class within which it falls.

A **DEED** of any kind not otherwise specifically charged with stamp duty requires a 10s. impressed stamp, which may be fixed at any time within 30 days of its first execution if made in the United Kingdom, or within 30 days of its first receipt in this country if executed abroad.

A **DELIVERY ORDER** does not require stamping (Finance Act, 1905).

A **DOCK WARRANT** or other warrant for goods requires a 3d. adhesive stamp which must be affixed by the person making or issuing the warrant, otherwise such person will incur a fine of £30. A document given by an inland carrier acknowledging the receipt of goods, and a weight note issued in conjunction with a duly stamped warrant, are exempt.

A **DUPLICATE OR COUNTERPART** of any instrument chargeable with duty, e.g., the duplicate of an agreement under hand or under seal, requires stamping as follows: Where the duty on the original does not amount to 5s., the same stamp duty as on

the original; in any other case, 5s. The stamp on a duplicate must be impressed or affixed within the legal period applicable in the case of the original.

A GUARANTEE under hand requires a 6d. adhesive or impressed stamp. If adhesive, it must be affixed and cancelled at the time of execution by the party signing the instrument. An impressed stamp may be affixed at any time within 14 days of the execution of the guarantee but not afterwards. If the guarantee is under seal, it requires a 10s. impressed deed stamp, which may be affixed at any time within 30 days of its first execution if made within the United Kingdom, or within 30 days of its receipt in this country if executed abroad.

AN I.O.U. does not require a stamp.

LETTERS OF ALLOTMENT AND LETTERS OF RENUNCIATION require a penny stamp if the nominal amount allotted or renounced is less than £5, and sixpenny stamp if the amount is £5 or above. The stamp upon a letter of renunciation may be adhesive or impressed, but if adhesive, it must be cancelled by the person by whom the letter of renunciation is executed. The stamp on a letter of allotment must be impressed, and separate stamps must be affixed if a letter of allotment and letter of renunciation form part of the same document.

LETTER OF CREDIT. See Bill of Exchange.

A LETTER OR POWER OF ATTORNEY usually requires a 10s. stamp, but the following exceptions should be noted:—

	£	s.	d.
(1) For the receipt of advance or interest on any stock in one payment only	0	1	0
in more than one payment	0	5	0
But an order or direction from the proprietor of any stock instructing a banker to pay the advance or interest to a person named does not require a stamp.			
(2) For the receipt of any sum of money, or any bill of exchange or promissory note for any sum of money, not exceeding £20, or any periodical payments not exceeding the annual sum of £10 ( <i>not being already charged</i> )	0	5	0
(3) For the sale, transfer, or acceptance of any of the Government or Parliamentary stocks or funds:—			
Where the value of the stocks or funds does not exceed £100	0	2	6
In any other case	0	10	0

MARKETABLE SECURITIES, which include "securities of such a description as to be capable of being sold in any stock market in the United Kingdom", are chargeable with duty at the following rates:—

(1) *Registered bonds or securities* not transferable by delivery, including colonial government securities:—

2s. 6d. per cent. upon the amount secured as in the case of a mortgage.

The duty payable upon the transfer of such securities is:—

Upon a sale—see Conveyance or Transfer on sale.

Upon a mortgage—see Mortgage of Stock or Marketable Security.

In any other case, 10s.



(2) *Bearer Securities* :—

## (a) Of the United Kingdom :—

(1) If issued before 7th August, 1885 . . . . . 5s. per cent.  
 (2) If issued after 7th August, 1885 . . . . . 4s. per £10

(b) Of Foreign Countries . . . . . 4s. per £10

(c) Of Colonial Municipal Securities . . . . . 2s. per £10

(d) Of Colonial Government Securities . . . . . 5s. per cent.

*Short Term Securities.* Short term marketable securities to bearer, other than Colonial Government Securities, i.e., those which are to be paid off within a term not exceeding three years after the date on which the duty is payable, shall be stamped at the rate of 6d. for every £10 or fractional part thereof if the instrument is to be paid off within a term not exceeding one year, but at the rate of 1s. for every £10 or fractional part of £10 if the instrument is to be paid off in a term *exceeding* one year but not exceeding three years.

THE MEMORANDUM OF ASSOCIATION of a joint-stock company requires a 10s. deed stamp, which must be impressed.

A NOTARIAL ACT of any kind, except a Protest (see below), requires a 1s. adhesive stamp, which must be cancelled by the notary.

A POLICY OF LIFE ASSURANCE requires an impressed stamp in accordance with the following schedule :—

	£	s.	d.
Where the sum insured does not exceed £10 . . . . .	0	0	1
Exceeds £10 but does not exceed £25 . . . . .	0	0	3
Exceeds £25 but does not exceed £500 :—			
For every full sum of £50, and also for any fractional part of £50, of the amount insured . . . . .	0	0	6
Exceeds £500 but does not exceed £1000 :—			
For every full sum of £100, and also for any fractional part of £100, of the amount insured . . . . .	0	1	0
Exceeds £1000 :—			
For every full sum of £1000, and also for any fractional part of £1000, of the amount insured . . . . .	0	10	0

Most other policies of insurance, e.g., against accident or sickness, other than a policy of marine insurance, require a 6d. stamp. (*Finance Act, 1920.*)

## PROTEST OF A BILL OF EXCHANGE OR PROMISSORY NOTE.

The stamp duty on a protest may be denoted by an adhesive or impressed stamp. If an adhesive stamp is used, it must be properly cancelled by the notary issuing the protest. The stamp duty on a protest is the same as that on the bill or note if the duty on the latter does not exceed 1s. ; in any other case, the duty is 1s.

A PROXY to vote at one meeting requires a penny impressed or adhesive stamp, but a proxy for more than one meeting requires a 10s. impressed stamp.

SCRIP AND SCRIP CERTIFICATES, or any coupons attached thereto, require a 2d. impressed stamp (*Finance Act, 1920.*) Any receipts attached to such instruments are exempt from

stamp duty by virtue of Exemption 11 of the Stamp Act, 1891. (See *ante*, page 695.)

A SHARE CERTIFICATE does not require a stamp.

SHARE WARRANTS OR STOCK CERTIFICATES TO BEARER, issued by a company or corporation in the United Kingdom, require stamping at three times the *ad valorem* duty which would be chargeable on a transfer for a consideration equal to the nominal value of the shares or stock. (See Conveyances or Transfers.) But a share warrant or stock certificate to bearer issued by a foreign or colonial corporation requires stamping at the rate of 4s. for every £10 or fractional part of the nominal value thereof. Stock Certificates to bearer issued by Colonial governments require stamping at the rate of 5s. per cent.

If a share warrant or stock certificate is not properly stamped, the company issuing the same, and any person by whom the instrument is issued, shall incur a fine of £50.

TRANSFERS OF SHARES OR STOCK, require stamping in accordance with the schedule given above under the heading "Conveyances", if first executed on or after the 1st September, 1920, and irrespective of the date of *presentation for registration*. The words in italics mean that an undated blank transfer held by a bank as security is not properly stamped unless the value of the duty is in accordance with that given in the schedule, if it is to be dated at any time after the 1st September, 1920.

### Stamp Duties on Bills of Exchange Abroad.

In the majority of foreign countries, bills of exchange drawn within the country must be drawn on paper bearing an impressed stamp, whereas bills drawn outside the country but negotiated or paid therein are stamped with adhesive stamps, the usual arrangement being thus similar to that existing in our own country.

IN AUSTRALIA, the stamp duties on bills of exchange vary in the different states. In New South Wales no duties are imposed. In all other states, the duty on bills "on demand" or "at sight" is one penny. In Victoria and Western Australia the stamp on other bills is 6d. per £25 up to £100, and thereafter 1s. per £50 or part thereof. In South Australia and Tasmania, the duty is 6d. for every £25 or part thereof, while in Queensland the duty is 1s. per £50 or part thereof.

The stamp duties in NEW ZEALAND are similar to those prevailing in Queensland.

IN CANADA there is a bill stamp tax of 2 cents on all cheques, bank drafts, money orders and short term notes, and 2 cents for each \$100 or part thereof on long term notes. Otherwise there is no stamp duty on bills of exchange.

IN GERMANY both inland and foreign bills of all kinds are stamped with adhesive stamps, while bills drawn, accepted and payable outside Germany are exempt from duty, even though

they may be negotiated within the country. On the other hand, bills drawn on Germany, but accepted payable therein, must be properly stamped upon acceptance. The absence of a stamp on a bill according to German laws will not deprive the parties to the instrument of their rights thereon, but any person who has taken part in the circulation of an unstamped bill in Germany will be subject to a fine of fifty times the value of the stamp duty payable. The stamp duty on both inland and foreign bills varies according to the period of the bill, but bills payable in a period not exceeding 3 months 5 days require stamping at the rate of .10 reichsmarks for each 100 R.M. or part thereof. The rates are reduced by 50 per cent. in the case of bills drawn in Germany but payable abroad.

IN FRANCE, bills drawn, accepted or made payable in the country are stamped at the rate of 20 centimes for every 100 francs or part thereof, but bills negotiated in France by indorsement only require stamping at the rate of 50 centimes for the first 1000 francs; from 1000 francs upwards the stamp is 50 centimes for each 2000 francs or fraction thereof. All cheques drawn in France now require a 20 centimes stamp. The acceptor of any bills on France must affix the requisite stamps and cancel them. Only the acceptor, or the drawer of an unaccepted bill, can be sued in a French Court on a bill which is unstamped or not properly stamped, and before any action can be taken the person suing must pay the duty and a fine of  $7\frac{1}{2}$  per cent. on the amount of the bill in respect of each party thereto, including the drawer, acceptor and each indorser, although the person paying can recover the amount from each of the persons liable.

IN HOLLAND a duty of 10 cents is payable on all bills and cheques at sight, and, on bills payable out of Holland, at not exceeding eight days after date. On other bills the stamp duty is fl. .10 up to fl. 200, from fl. 200 to fl. 500 an *additional* .05 for each fl. 100, and thereafter fl. .25 for each fl. 500 or part thereof. On bills for amounts above fl. 10,000, the stamp is fl. .50 for every fl. 1000 or part thereof.

SWITZERLAND. Cheques and demand drafts are free from stamp duty, but if they are left in circulation for more than 20 days they require stamping as bills of exchange. The duty on bills of exchange after date or sight is  $\frac{1}{4}$  per mille or 50 centimes per 100 francs for each period not exceeding 6 months.

UNION OF SOUTH AFRICA. All bills of exchange drawn within the Union must be stamped within 7 days of execution, while bills drawn outside the Union must be stamped within 7 days of their receipt within the Union. The duty is as follows:—

Bills on demand, at sight, etc., and cheques, 1d. Otherwise, not exceeding £10, 1d. Thereafter 6d. for each £50 or part thereof.

UNITED STATES. There is no stamp duty on bills of exchange in the United States of America.

# INDEX

	PAGE		PAGE
Abstract. <i>See</i> Returns		Associations . . . . .	152, 155
Acceptance Credits . . . . .	495	Aval . . . . .	285
Acceptance of a Bill . . . . .	201, 394 <i>et seq.</i>	<b>B</b>	
For honour <i>supra</i> protest . . . . .	441, 442	Bailee, Banker as . . . . .	18, 676
Presentment for. <i>See</i> Presentment		Bailor . . . . .	676
for Acceptance		Balance Sheet, combined, of Joint	
Time for . . . . .	395	Stock Banks . . . . .	40
Acceptances—		Balance Sheet of Joint Stock Bank . . . . .	28
General and Qualified . . . . .	396	Percentage Figures of . . . . .	37
Liabilities for . . . . .	30, 35	Significance of . . . . .	36
Qualified, and the Holder . . . . .	402	Balances with "Other Banks" . . . . .	31
Acceptor for Honour; Presentment		Bank Bills . . . . .	32
to . . . . .	444	Bank Charter Act . . . . .	46, 47
Acceptor of a Bill . . . . .	218, 413	Bank, Definition of . . . . .	15, 16
Accommodation Bills . . . . .	233	Bank Note Register . . . . .	73
Accommodation Parties . . . . .	233	Bank Notes . . . . .	26, 31, 35, 41, 45, 95, 100, 459
Accounts of Customers . . . . .	160 <i>et seq.</i> 519 <i>et seq.</i>	Beginnings of . . . . .	3
Adhesive Stamps—Cancellation of . . . . .	687	Circulation of . . . . .	35, 48
Administrators . . . . .	113, 296, 297, 542	Issue and Backing . . . . .	46
Advances—		Scotch . . . . .	101
Against Produce and Goods . . . . .	657	Stamp Duty . . . . .	706
On Current Account . . . . .	49	Bank of England . . . . .	5, 13, 35, 40 <i>et seq.</i> , 50, 56, 367, 459
On Promissory Notes . . . . .	466	Return of . . . . .	47-50, 55
Ratio of, to Liabilities . . . . .	38	Bank of Ireland . . . . .	22, 35
Securities for . . . . .	570 <i>et seq.</i> , 682	Bank of Scotland . . . . .	22
To Customers . . . . .	34	Bank Post Bills . . . . .	49, 490 <i>et seq.</i>
Agents . . . . .	118 <i>et seq.</i>	Bank Rate . . . . .	51 <i>et seq.</i>
Appointment of . . . . .	118	Banker . . . . .	4, 15, 171, 201
Bankruptcy of . . . . .	121	As Agent . . . . .	17
Duties of . . . . .	119	Creation of Capital . . . . .	19
General . . . . .	118	Function and Utility of . . . . .	17, 18
Rights of . . . . .	120	Banker's Call and Seven Day Rates . . . . .	63
Signature of . . . . .	121, 294	Bankers' Deposit Rate . . . . .	53
Special . . . . .	118	Bankers' Drafts upon Demand . . . . .	488
Specimen Indorsements of . . . . .	295	Banker's Funds . . . . .	26
Universal . . . . .	118	Banking Theory . . . . .	46
Aliens as Customers . . . . .	115	Bankruptcy . . . . .	112
Allonge . . . . .	279	Distribution of Estates in . . . . .	527
Alterations of Bills . . . . .	236, 425, 453	Notice of . . . . .	320
Amalgamations, 1918-1920 . . . . .	10	Of Agent . . . . .	121
American Railway Share Certificates . . . . .	600	Of Customer . . . . .	523
Appropriated Stamps . . . . .	686	Of Depositor . . . . .	513
Appropriation of Payments . . . . .	168	Of Partner . . . . .	131
Articles of Association . . . . .	29, 138, 555	Of Partnership . . . . .	550
Stamp Duty on . . . . .	705	Of Surety . . . . .	625
Articles of Partnership . . . . .	125	Of Trustee . . . . .	541
Stamp Duty on . . . . .	705	Official Receiver in . . . . .	116
Artificial Persons . . . . .	134	Proof in . . . . .	525
Assets of a Banker . . . . .	30, 31	Receiving Order . . . . .	116
Assignment of Balance . . . . .	324	Scheme of Composition . . . . .	527
"    of Debts as Security . . . . .	634		
"    of Deposit Receipt . . . . .	511		
"    Transfer by . . . . .	386		

	PAGE		PAGE
Bankruptcy Rules, 1915 . . . . .	541	Bill of Exchange ( <i>continued</i> )—	
Bankrupts . . . . .	115 <i>et seq.</i>	Term . . . . .	194
Undischarged . . . . .	535	Transfer . . . . .	384
Banks—		Transfer by Assignment . . . . .	386
Big Five . . . . .	7, 20, 22, 58	Treated as Promissory Note . . . . .	471
Central . . . . .	5	Unpaid . . . . .	379
Clearing . . . . .	36	Bill of Lading . . . . .	659
Colonial . . . . .	12, 21	Stamp Duty on . . . . .	706
Dominion . . . . .	21	Bill of Sale . . . . .	670
Eastern Exchange . . . . .	21	Stamp Duty on . . . . .	706
Foreign . . . . .	12, 22	Bills Discounted . . . . .	32, 377
Irish . . . . .	21	Blank Credits . . . . .	496
Joint Stock. ( <i>See also</i> J.S. Banks)	22	Blank Transfer . . . . .	596
Modern . . . . .	15	Bonds . . . . .	483
National . . . . .	24	Stamp Duties on . . . . .	703
Number of . . . . .	11	Branch Banking . . . . .	11, 23, 38, 58, 59, 67
Of Deposit . . . . .	7	Branch Clearings . . . . .	70
Of Issue . . . . .	7	Branch Information Book . . . . .	522
Private . . . . .	10, 20, 21, 46	British Monetary System . . . . .	99
Scotch . . . . .	21	Broker as Customer . . . . .	122
State . . . . .	24	Building Societies . . . . .	152
Bearer, definition of . . . . .	202	Business Day . . . . .	400
"Big Five" . . . . .	7, 12, 22, 58, 75		
Bill Brokers . . . . .	60	<b>C</b>	
Bill of Exchange—		Cancellation of Adhesive Stamps . . . . .	687
Acceptance . . . . .	394	Capital . . . . .	9, 29, 39
Acceptance for Honour (Example)	442	Cash Book . . . . .	74
As Security . . . . .	633	"Cash in Hand" . . . . .	50
Capacity of Parties . . . . .	219	Cash Orders . . . . .	498
Collection . . . . .	349, 375, 378	Cashier, Payments by . . . . .	72
Consideration . . . . .	231	Central Reserve System . . . . .	13, 31, 56
Currency . . . . .	194, 231	Certificate of Incorporation . . . . .	555
Date . . . . .	226	Certificate of Origin . . . . .	491
Definition . . . . .	202	Certificate to Commence Business . . . . .	140, 555
Delay in Presentment for Pay- ment . . . . .	407	Charges . . . . .	145
Delivery . . . . .	382	Charter Party, Stamp Duty on . . . . .	706
Discharge . . . . .	419, 447	Check Ledger . . . . .	84
Dishonour . . . . .	419, 420, 423 <i>et seq.</i>	Cheque Book . . . . .	162
Drawee . . . . .	218	Cheques . . . . .	244 <i>et seq.</i> , 306 <i>et seq.</i>
Drawer . . . . .	217	Advising, Fate of . . . . .	336
Drawn Abroad . . . . .	691	Alterations . . . . .	266
Drawn in a Set . . . . .	239, 696	Bearer . . . . .	252
Examples . . . . .	97, 199 <i>et seq.</i>	Cancellation . . . . .	269
Excuses for Non-Presentment for Payment . . . . .	408	Collection of . . . . .	349, 352, 358, 371, 374, 375
Form . . . . .	202	Country . . . . .	375
Holder . . . . .	214, 381	Crossed. <i>See</i> Crossed Cheque	
Indorsement. <i>See</i> Indorsements		Definition . . . . .	97, 244, 259
Indorser . . . . .	219	Dishonour . . . . .	340
Issue . . . . .	322	Drawn on Banks in Ireland . . . . .	372
Liability of Parties . . . . .	411, 415	Drawn on Banks in Scotland . . . . .	372
Lost . . . . .	242	Form . . . . .	245
Material Alterations . . . . .	236	Inchoate . . . . .	265
Negotiability . . . . .	195	Indorsement . . . . .	276
Negotiation . . . . .	381	In legal form . . . . .	312
Payable with Interest—Stamp Duty . . . . .	696	Irregularly Drawn . . . . .	304
Parties . . . . .	217	Lost . . . . .	270
Payable to Bearer . . . . .	209	Marked . . . . .	333 <i>et seq.</i>
Payee . . . . .	218	Metropolitan . . . . .	375
Payment . . . . .	402	Mutilation . . . . .	270
Re-issue . . . . .	387	Negotiability . . . . .	255, 261
Stamping . . . . .	634 <i>et seq.</i>	Not Transferable . . . . .	265, 363
Tenor . . . . .	217	Order . . . . .	252

	PAGE		PAGE
Cheques ( <i>continued</i> )—		Countermand of Payment . . . . .	319
Parties . . . . .	245	Coupons . . . . .	145, 483
Payment by . . . . .	272	Credit Instruments . . . . .	18, 89, 98
Payment of . . . . .	170, 172, 308, 312, 318, 319, 326, 328	Credit, Limits to Banker's Power to Create . . . . .	41
Returned . . . . .	305, 341, 374	Crossed Cheques . . . . .	259, 341
Signature . . . . .	249	Account Payee . . . . .	363
Stale . . . . .	254, 256	Definition . . . . .	259
Special Forms . . . . .	275	General Crossings . . . . .	259
Stamp Duty on . . . . .	259	Opening a Crossing . . . . .	264
Travellers' . . . . .	504	Payment . . . . .	328
Town . . . . .	375	Special Crossings . . . . .	259
Unpaid . . . . .	379	Specimen Crossings . . . . .	260
Cheque System . . . . .	9	Crossed Documents, Protection of Bankers Paying . . . . .	331
Chose in Action . . . . .	196	Cunliffe Limit . . . . .	41, 102
Circuity of Action . . . . .	387	Currency and Banking . . . . .	89
Circular Notes . . . . .	503	Currency Notes Account . . . . .	101
City of Glasgow Bank Failure . . . . .	8	Currency Theory . . . . .	46
Classification of Banks . . . . .	20, 22	Current Account Book . . . . .	81
Clayton's Case, Rule in . . . . .	169, 170, 549, 561, 573, 611, 617, 619, 627, 634	Current Accounts and Statute of Limitation . . . . .	166
Clean Cash Book . . . . .	81	Customer . . . . .	105 <i>et seq.</i>
Clearing Settlement . . . . .	369	Definition of . . . . .	105, 106
Clearing System . . . . .	364 <i>et seq.</i>	Information <i>re</i> . . . . .	521
Clearings—		Kinds of . . . . .	107
Branch . . . . .	374		
Country . . . . .	367, 368	<b>D</b>	
Irish . . . . .	373	Daily Abstract . . . . .	61
Local . . . . .	365	Date—	
London . . . . .	366	Due . . . . .	227, 457
Metropolitan . . . . .	367, 368	Of a Bill . . . . .	226, 231
Town . . . . .	367	Of a Cheque . . . . .	254, 257
Club as Customer . . . . .	155	Days of Grace . . . . .	227 <i>et seq.</i>
Collateral Security . . . . .	551, 580	Death of Customer . . . . .	523
Collecting Banker, Liability and Protection of . . . . .	349 <i>et seq.</i>	Debentures . . . . .	144
Collection of Bills . . . . .	375 <i>et seq.</i>	As Security . . . . .	558
Collection of Cheques . . . . .	349, 352, 374 <i>et seq.</i>	Stamp Duty . . . . .	703, 707
Commission on Turnover . . . . .	42	Deed of Assignment . . . . .	528, 604, 606
Companies—		Deed, Stamp Duty on . . . . .	707
Non-trading . . . . .	151	Deficiency Bills . . . . .	50
Private limited . . . . .	136	Delivery . . . . .	202
Public limited . . . . .	136	Delivery Orders . . . . .	663
Registered . . . . .	151	Stamp Duty . . . . .	707
Statutory . . . . .	151	Deposit Account Ledgers . . . . .	76
Unlimited . . . . .	136	Deposit Accounts . . . . .	17
Conditional Orders . . . . .	474	Joint . . . . .	534
Form of Indemnity . . . . .	477	Statute of Limitation . . . . .	168
Confidential Opinions . . . . .	174	Deposit Banking, Beginnings of . . . . .	3
Conflict of Laws . . . . .	455	Deposit, Banks of . . . . .	7
Consideration for a Bill . . . . .	231	Deposit Receipts . . . . .	190, 505 <i>et seq.</i>
Continuing Security . . . . .	611	Deposits of Big Five . . . . .	58
Contract, Definition of . . . . .	108	Deposits, Public, of Bank of England . . . . .	49
Contract Note, Stamp Duty . . . . .	706	Development of British Banking . . . . .	1
Contractual Capacity of Customers . . . . .	106	Discount Houses . . . . .	50
Conversion . . . . .	315, 350, 680	Dishonour, Notice of. <i>See</i> Notice of Dishonour . . . . .	
Conveyance, Stamp Duty on . . . . .	707	Distringas . . . . .	598, 599
Corporations—		Dividend Warrants . . . . .	362, 479
Aggregate . . . . .	134	Dock and Warehouse Warrants . . . . .	661
Common Law . . . . .	151	Docquet . . . . .	189, 328
Non-trading . . . . .	151	Documentary Bill . . . . .	491
Sole . . . . .	134	Documentary Credit (Specimen) . . . . .	498, 506
Statutory . . . . .	151		
Corporations, Capacity of, in respect of Bills . . . . .	221		

	PAGE
Documents in the Form of Receipts	478
Drawee of a Bill . . . . .	218, 350
Drawer of a Bill . . . . .	217
Liability . . . . .	256, 412
Drawer of a Cheque . . . . .	308 <i>et seq.</i>
Drawn Bonds . . . . .	682
Drunken Persons as Customers . . . . .	114
Duplicate Pass Book . . . . .	190

E

Equitable Assignment . . . . .	190
Equitable Mortgages of Stocks and Shares . . . . .	505
Equities . . . . .	192
Equity of Redemption . . . . .	604, 643, 650
Estoppel . . . . .	235, 310, 358
Executors . . . . .	113, 296 <i>et seq.</i> , 542
Exemptions from Stamp Duty . . . . .	686, 694, 702
Exporters' Credits . . . . .	496

F

Factor as Customer . . . . .	122
Fictitious Payees . . . . .	209
Floating Charges . . . . .	145, 559
Foreign Bills . . . . .	210, 213, 240
Forged Signatures . . . . .	235
Friendly Societies . . . . .	154

G

Garnishee Orders . . . . .	162, 324, 514
General Cash Account . . . . .	88
General Cash Book . . . . .	79, 81
General Ledger . . . . .	69, 79, 84
Gold Standard . . . . .	41, 103
Goldsmiths' Book . . . . .	371
Guarantee—	
Continuing, Effect of . . . . .	617
Definition . . . . .	609
Determination . . . . .	623
Distinguished from Indemnity . . . . .	612
Joint and Several . . . . .	631
Power to Give . . . . .	616
Rule in Clayton's Case and Specific, Effect of . . . . .	617, 619
Specimens . . . . .	610, 622
Stamp Duty . . . . .	708
Statutes of Limitation and Validity . . . . .	632, 614, 615, 616
Guarantor, Rights and Obligations of . . . . .	628

H

Holder . . . . .	203
Cancellation by . . . . .	452
Duties of . . . . .	393
Duty of, to Stamp a Foreign Bill For Value . . . . .	603, 216
In Due Course . . . . .	215, 330
Powers of . . . . .	389

	PAGE
Holder ( <i>continued</i> )—	
Remedy of, Before Bill is Overdue	242
Renunciation by . . . . .	451
Rights of . . . . .	389, 391
Holidays . . . . .	228
Householder's Protest . . . . .	437
Husband and Wife, Account of . . . . .	534

I

I.O.U. . . . .	462
Stamp Duty . . . . .	696, 708
Inchoate Instruments . . . . .	237
Indorsements—	
Anomalous Payees . . . . .	304
Bills . . . . .	276
Blank . . . . .	280
Cancellation . . . . .	286
Cheques . . . . .	276
Classes of . . . . .	280
Conditional . . . . .	282
Courtesy Titles . . . . .	289
Definition of . . . . .	202, 276
Dividend and Interest Warrants . . . . .	307
Effect of . . . . .	284
Examples of . . . . .	290 <i>et seq.</i>
Facultative . . . . .	285
Fictitious Payees . . . . .	303
Foreign Languages . . . . .	307
Generally . . . . .	288
Impersonal Payees . . . . .	303
Individuals . . . . .	290
Limiting Liability . . . . .	285
Mark, by . . . . .	303
Negating . . . . .	285
Non-Existing Payees . . . . .	303
Official and Fiduciary Payees . . . . .	301
Partial . . . . .	280
Requisites of Validity . . . . .	279
Restrictive . . . . .	282
Special . . . . .	280
Indorser, Liability of . . . . .	285, 415
Infants as Customers . . . . .	108, 528
Liability of . . . . .	220
Inland Bills . . . . .	210
Stamping . . . . .	690
Interest, Banker's Right to Charge . . . . .	173
Interest on Stocks and Shares . . . . .	43
Interest Warrant . . . . .	362, 479
Intervention for Honour . . . . .	441
Investments, Advice on . . . . .	180
Investment of Banks . . . . .	33, 38
Irish Free State and Stamp Duties . . . . .	692
Issue . . . . .	202
Issue, Banks of . . . . .	7

J

Joint Accounts . . . . .	531
Joint and Several Guarantees . . . . .	621, 626
Joint and Several Liability . . . . .	464 <i>et seq.</i>
Joint and Several Promissory Note . . . . .	463
Joint Payees, Indorsements of . . . . .	291

	PAGE	N	PAGE
Joint Stock Bank . . . . .	22 <i>et seq.</i>		354
Rate of Interest of . . . . .	53		195
Joint Stock Company . . . . .	135 <i>et seq.</i>		589
Accounts of . . . . .	553		255
Indorsements of . . . . .	299		98, 195
Winding up . . . . .	151		381 <i>et seq.</i>
<b>L</b>			
Land and Goods as Securities . . . . .	636		389
Landed Property . . . . .	637		387
Lease, Stamp Duty on . . . . .	705		228
Legal Tender . . . . .	31, 40, 41, 94, 95		209
Letter of Authority . . . . .	546		
Letter of Hypothecation . . . . .	493, 688		
Letter of Indication . . . . .	501		
Letters of Administration . . . . .	113		
Letters of Allotment, Stamp Duty on . . . . .	708		
Letters of Credit . . . . .	495 <i>et seq.</i>		
Circular . . . . .	500		
Documentary . . . . .	497		
Stamp Duty . . . . .	708		
Lien . . . . .	120, 178, 576-580, 598, 680		
Life Policy as Security . . . . .	601 <i>et seq.</i>		
Stamp Duty . . . . .	709		
Limited Liability Applied to Banks . . . . .	7		
Liquid Assets . . . . .	31, 33		
Liquidators as Customers . . . . .	112, 541		
Local Authorities as Customers . . . . .	156		
London Clearing Banks—Average . . . . .			
Balance Sheet . . . . .	37		
London Clearing House . . . . .	60, 364, 366		
London Money Market . . . . .	32, 44, 53		
London Rates of Discount and . . . . .			
Interest . . . . .	53		
Lost Bill . . . . .	242		
Lunatics as Customers . . . . .	114		
<b>M</b>			
Mandates . . . . .	78, 161, 520 <i>et seq.</i>		
Marine Insurance Policies, Stamp . . . . .			
Duties on . . . . .	704		
Marketable Securities, Stamp Duty . . . . .	708		
Married Women— . . . . .			
Accounts of . . . . .	529		
Customers . . . . .	108		
Indorsements of . . . . .	291		
Mate's Receipt . . . . .	660		
Memorandum of Association . . . . .	136		
Stamp Duty . . . . .	709		
Memorandum of Charge . . . . .	574		
Memorandum of Deposit . . . . .	574, 595		
Memorandum of Transfer . . . . .	595		
Monetary System . . . . .	99		
Money . . . . .	89-96		
Money "at Call," etc. . . . .	32, 42, 51		
Money Orders . . . . .	486		
Money Paid by Mistake . . . . .	345		
Mono-Metallic System . . . . .	94		
Mortgagee, Rights of . . . . .	647		
Mortgages . . . . .	574, 604, 643 <i>et seq.</i>		
	703		
Mortgagor, Rights of . . . . .	649		
Negligence . . . . .			354
Negotiability . . . . .			195
Negotiability by Estoppel . . . . .			589
Negotiability of a Cheque . . . . .			255
Negotiable Instruments . . . . .			98, 195
Negotiation of Bill . . . . .	381 <i>et seq.</i>		
Dishonoured Bill . . . . .			389
Overdue Bill . . . . .			387
Non-Business Days . . . . .			228
Non-Existing Persons . . . . .			209
Non-Trading Firm—Power of . . . . .			
Partner to Bind . . . . .			548
"Not Negotiable" Crossing . . . . .			261
Notarial Act of Honour . . . . .			446
Stamp Duty . . . . .			709
Notary Public . . . . .			432
Note Issues . . . . .			9
Notes, Bank. <i>See</i> Bank Note and . . . . .			
Treasury Note . . . . .			
Notice of Dishonour . . . . .	421 <i>et seq.</i>		
Delay in Giving . . . . .			429
Dispensed with . . . . .			429
Form . . . . .			424
Rules Governing . . . . .			422
Specimen . . . . .			425
Time Limit . . . . .			426
Notice of Lien over Shares . . . . .			598
Notice of Removal of Charge over . . . . .			
Life Policy (example) . . . . .			607
Noting a Bill . . . . .			432, 433
Novation . . . . .			613, 627, 631
<b>O</b>			
Opinions, Confidential . . . . .			174
Ordinary Course of Business . . . . .			314
Organisation of Head Office . . . . .	63 <i>et seq.</i>		
Other Deposits . . . . .			52, 55
Other Securities (Bank of England) . . . . .			48, 50
Outclearing . . . . .			368
Overdrafts . . . . .			42
Overdrafts in Branch Accounts . . . . .			78
Overseers of Parish . . . . .			157
<b>P</b>			
Parties to Bills of Exchange . . . . .			194
Partner— . . . . .			
Bankruptcy . . . . .			131
Death . . . . .			131
Implied Rights . . . . .			128
Liability . . . . .			128
Nominal . . . . .			128
Powers . . . . .			126
Partnership . . . . .	124 <i>et seq.</i>		
Accounts of . . . . .			519
At Will . . . . .			125
Creation of . . . . .			125
Definition . . . . .			124
Dissolution . . . . .			130
Holding Out . . . . .			127
Limited . . . . .			125, 132



	PAGE		PAGE
Partnership ( <i>continued</i> )—		Protesting a Bill of Note ( <i>continued</i> )—	
Novation in Reference to . . . . .	130	Requisites as to Form . . . . .	436
Test of . . . . .	127	Security, for better . . . . .	438
Pass Book . . . . .	185 <i>et seq.</i>	Stamp Duty . . . . .	709
Deposit Account . . . . .	190	Time of . . . . .	434
Entries in . . . . .	187	When essential . . . . .	433
Loss of . . . . .	190	Public Deposits . . . . .	55
Past Due Bills . . . . .	79		
Payee of a Bill . . . . .	218	Q	
Paying Banker, Protection of . . . . .	312, 329	Quasi Indorser . . . . .	219, 415
Paying-in Slip Book . . . . .	71		
Payment for Honour <i>supra protest</i>		R	
Effect of . . . . .	445 <i>et seq.</i>	Receipt Stamp Duty, Documents	
Refusal of . . . . .	446	exempt from . . . . .	699
Payment on Demand . . . . .	447	Receipts, Stamps on . . . . .	698
Payment in Due Course . . . . .	208	Re-draft . . . . .	440
Payments, Appropriation of . . . . .	449	Re-exchange . . . . .	440
Payments under Standing Orders . . . . .	168	Referee in case of need . . . . .	217, 440, 444
Per Procurator Signature . . . . .	181	Reserve Fund . . . . .	30
Person . . . . .	121, 293	Restraint upon Anticipation . . . . .	108
Persons of Unsound Mind—Accounts . . . . .	202	Returns . . . . .	59 <i>et seq.</i>
Pledge as Security . . . . .	530	Revolving Credits . . . . .	497
Postal Orders . . . . .	574	Rule against Circuity of Action . . . . .	387
Posting of Deposit and Current		Running Credits . . . . .	497
Accounts . . . . .	486		
Powers of Attorney . . . . .	81	S	
Presentment for Acceptance . . . . .	516	Safe Custody—	
Comparison with Presentment for		Lien over Articles in . . . . .	680
Payment . . . . .	397 <i>et seq.</i>	Presentment of Drawn Bonds and	
Excused, when . . . . .	410	Coupons in . . . . .	682
Mode . . . . .	401	Receipt for Articles left in . . . . .	672
Rules as to . . . . .	401	Register of Valuables in . . . . .	675
Presentment for Payment . . . . .	399	Return of Goods left for . . . . .	679
Defect in Title of Presenter . . . . .	403 <i>et seq.</i>	Third Parties . . . . .	680
Excused, when . . . . .	408	Wrong Delivery of Articles in . . . . .	680
Mode . . . . .	401	Scotch Banks, Collection of Articles	
Place of . . . . .	405	at . . . . .	373
Promissory Note . . . . .	408	Scrip, Stamp Duty on . . . . .	709
Rules governing . . . . .	326	Secrecy, Banker's Duty of . . . . .	174
Probate . . . . .	113	Securities and Bank of England . . . . .	49
Profits of Bank, Sources of . . . . .	42	Securities for Advances . . . . .	570
Promissory Notes . . . . .	459	Articles in Safe Custody as . . . . .	682
Advances on . . . . .	466	Inconvertible . . . . .	593
And Law relating to Bills . . . . .	470	Non-Negotiable . . . . .	593
As Security . . . . .	467, 633	Realisation of . . . . .	584
Doctrine of Principal and Surety . . . . .	465	Receipt for . . . . .	584
Definition of . . . . .	460	Types of Stock Exchange . . . . .	599
Delivery of . . . . .	463	Security—	
Foreign . . . . .	463, 691	Collateral . . . . .	572
Illegal . . . . .	463	Formal . . . . .	574
Inland . . . . .	463	Goods as . . . . .	664, 668
Joint and Several . . . . .	463	Informal . . . . .	576
Liability of Maker . . . . .	469	Inscribed Stocks as . . . . .	593
Lost . . . . .	472	Land as . . . . .	643
Material Alterations . . . . .	472	Life Policies as . . . . .	601
Payable on Demand . . . . .	468	Personal . . . . .	572, 609
Presentment for Payment . . . . .	468	Stocks and Shares as . . . . .	587, 594
Stamp Duties . . . . .	470	Set-off, Banker's Right of . . . . .	176
Stamping of . . . . .	687 <i>et seq.</i>	Share Capital . . . . .	142
Stamping after Execution . . . . .	697	Share Certificate . . . . .	142
Protesting a Bill or Note . . . . .	432 <i>et seq.</i>		
Delay in . . . . .	437		
Inland Bill . . . . .	433		
Lost Bill . . . . .	437		
Place of . . . . .	435		



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